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REPORTS OF CASES

DECIDED IN

THE EASTERN DISTRICT COURT

OF THE COLONY OF THE

CAPE OF GOOD HOPE,

Court of the Eastern District, Cape Colony Law Reports &c

REPORTED BY

ROBERT M. KING,

OF THE KING'S INN, DUBLIN, BARRISTER-AT-LAW.

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J. C. JUTA & CO.,

CAPE TOWN | PORT ELIZABETH

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EASTERN DISTRICTS' COURT REPORTS.

VOL. IX.

PART I.

MELVIN *vs.* BUILDING COMMITTEE OF ST. CYPRIAN'S SOCIETY.

Building Contract—Architect's Certificate—Dismissal of Architect—Arbitration.

A building contract provided that the defendants, for whom certain work was being done, should appoint an architect, on whose certificate payments should be made and to whom all disputes should be referred. An architect whose name was submitted to the contractor and approved of by him was appointed, various sums were paid under his certificate, but before the completion of the work he was dismissed by the employer without the consent of the contractor. On the completion of the work the contractor obtained this architect's certificate for balance due under the contract for work and extras and sued on it, the defendants tendering a quantum meruit. Held, *that defendants could not withdraw their submission to this architect's award, and were liable for amount as certified by him.*

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" 31.

Melvin *vs.* Building Committee of St. Cyprians.

The evidence in this case was taken before JONES, J., at

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„ 31.

Melvin *vs.* Building Committee of St. Cyprian's.

the Circuit Court at Port Elizabeth, and the case reserved for argument before the full Court.

The summons in the Circuit Court claimed £147 1*s.* 9*d.* balance due to plaintiff under a contract entered into by him with defendant committee for the execution of certain builder's and carpenter's work on St. Cyprian's Hall, Port Elizabeth. The contract provided that the work should be done to the satisfaction of the Committeee or of an agent to be appointed by them; that payments should be made from time to time upon this agent's certificate; and "that all disputes connected with this contract as to materials, values, extents, or meaning of plans and specifications, or in any way arising out of this contract, shall be decided by the agent appointed by the Building Committee, whose decision shall be binding." In terms of this contract Mr. Peek, with plaintiff's concurrence, was appointed by the defendants as their architect and agent, and during the progress of the work £361 19*s.* was paid to the plaintiff upon certificates granted by him. In August, 1893, before the completion of the work, defendants dismissed Mr. Peek, without the consent of the plaintiff. The plaintiff, on completion of the work, got a certificate from Mr. Peek to the effect that the work under the contract and certain extras authorised by the committee had been completed to his satisfaction, and that after deducting the £361 19*s.* paid, the sum of £147 1*s.* 9*d.* was due to the plaintiff. This sum the plaintiff now claimed.

The defendants in their plea set forth that they had dismissed Mr. Peek in August, 1893, and had made no new appointment of architect in consequence of the plaintiff's refusal to recognise any one in his stead. They submitted that they were not bound by any certificate of Mr. Peek for work done after he had ceased to be their architect, and tendered £98 14*s.* 5*d.*, which they alleged to be the full value of such work done, as a full settlement of the plaintiff's claim.

The plaintiff denied the defendants' right to dismiss the architect appointed under the contract, and maintained that defendants were still bound by his certificate.

King (for *Sampson*) on behalf of plaintiff. When it is agreed that payments are to be made upon an architect's

certificate, the granting of such certificate is a condition precedent of any litigation. Except in the case of fraud or collusion (neither of which is suggested here) the contractor could not recover in any action without first obtaining this certificate, and, though the point never seems to have been judicially decided, the converse must hold, that once it is granted defendant is bound by it (*Scott* vs. *Corporation of Liverpool*, 3 De G. & J., 334; *Hansen & Schræder* vs. *Deare*, 3 E. D. C., 36; *Wilson* vs. *Holt*, 4 G., 220; *Scott* vs. *Sytner*, 9 Jut. 50).

The agreement to refer all disputes to the arbitration of the architect is binding equally on plaintiff and defendant; under the contract this reference to arbitration is clearly a condition precedent to litigation and not merely a collateral agreement to refer matters to arbitration; and it is settled law that though the latter is revocable, the former is irrevocable (*Scott* vs. *Avery*, 5 H. C. 811; *Davies* vs. *South Brit. Insurance Co.*, 3 Jut. 416); consequently defendant could not revoke agreement by merely saying, "I dismiss my architect." If building owner can dismiss architect at will, while contractor cannot, architects would be coerced into giving certificates favourable to owner. An architect is really in the position of an arbitrator, and the English decisions shew that an arbitrator once appointed is irremovable except in case of fraud, collusion, or refusal to act (*Stevenson* vs. *Watson*, 4 C. P. Div. 159; *Sudbrooke* vs. *Barrett*, 36 L. T. (N.S.) 616).

The same rule follows from the Roman-Dutch text-writers (*Voet*, 19, II. 36).

Blaine (for defendants). There seems to be no decided case exactly in point, so the whole tenour of the contract must be considered. When plaintiff tendered for contract he made no mention of architect, or of work being paid under his certificate. This proviso was inserted in the contract as a safeguard for defendants, and the architect was solely their agent. The work was to be done to the satisfaction of the committee *or* their agent; so they need not have appointed one at all, and when they did they could dismiss him at will. *Kemp* vs. *Rose*, 1 Giff. 258, cited in *Scott* vs. *Avery* (*supra*), shews that arbitrator's decision not always final; where bias is suspected, even without fraud, either party may refuse to be bound by it. In *Lock* vs.

1894.
May 25.
„ 31.

Melvin *vs.* Building Committee of St. Cyprian's.

Claridge (1 Jur. 356) COURT had held architect's certificate not final with regard to certain extras outside the contract.

Cur. adv. vult.

Posteà (May 31st).

JONES, J., delivered the judgment of the Court.

In this case the plaintiff and the defendant society agreed in writing that plaintiff should erect certain buildings for a price named, and contracted to pay the contractor as the work progressed according to certificates from a person who is called their agent. The defendant committee reserved to themselves the right to alter, omit, or add to any of the work without in any way departing from the contract, and contracted that any additions or deductions should be measured and valued by the Building Committee's supervisor, whose decision should be binding. The work, it was further agreed, should be carried out under the supervision of an agent appointed by the Building Committe, who was to have full power to condemn any material or work which he might consider not consistent. Payments were to be made monthly to the extent of 35 per cent. of the work done, the balance to remain in the hands of the Building Committee for one month after completion, at which date if the work is in good order the Building Committee may reduce it to 5 per cent. for further three months as a maintenance security. All disputes connected with this contract as to the materials, values, extents, and meaning of plans, specifications, &c., in any way arising out of this contract, shall be decided by an agent to be appointed by the Building Committee, whose decision shall be binding.

Now it appears that before signing this contract tenders had to be called for, and the plaintiff's tender had been accepted by the defendants in a letter written on the 24th of September, 1892, by Charles Edenberry on their behalf. In this letter a blank had been left when it was sent to the plaintiff. This was in the postscript which read at first, "You will have to look to Mr. —— for instructions, he having full power over the works." The plaintiff thereupon refused to sign the written contract in accordance with his

tender before he knew how the blank was to be filled in. Subsequently the name of Dix Peek was put in, and later on after having been informed of the name which had been inserted, he signed the contract and specifications, and performed the work stipulated for receiving payments until August under the certificates of Mr. Dix Peek. In August the defendants dismissed Peek from his office for some cause which is not pleaded. It is not said that he was guilty of conduct which would render him incompetent to perform the duties of arbitrator between the parties; nothing in the shape of fraud or collusion or incompetency through adverse interests is suggested. The work continued, and at its completion Dix Peek gave his certificate shewing that the sum of £147 1*s.* 9*d.* was due by the defendants.

When this case was heard at Port Elizabeth Mr. Sampson objected to any evidence being given which tended to vary the result of the architect's certificate, as neither fraud nor collusion had been alleged, and no ground had been set up by the defendant for dismissing the arbitrator or referee selected by the parties to determine the actual value of the work or materials, and he relied upon the case of *Hansen & Schræder* vs. *Deare*, 3 E. D. C. 36. On the other hand Mr. Blaine contended that before the agent had actually pronounced his award the defendants had dismissed him and given the plaintiff notice of this fact; and further, even if the person named as supervisor was an arbitrator, he could be dismissed or his powers could be revoked before he had actually exercised his powers, and he referred to Russell on Arbitration, p. 146. He contended that any award made after the cancellation of the appointment of arbitrator was absolutely void.

This question was reserved for further argument before the Eastern Districts Court. It has now been argued. Upon reference to the authorities it does not appear that our law is precisely in accord with that which is laid down in the passage cited as the Common Law of England. The position of Mr. Peek was that of a person agreed upon between the parties to fix and determine the price or value of certain labour to be performed and materials to be provided by the plaintiff. Such a contract, I take it, would be good and valid, as soon as the parties had agreed upon their referee, unless there were some valid grounds shewn

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May 28.
" 31.

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for setting aside his award. When the amount had been definitely fixed by the person agreed upon, it seems to me that the plaintiff could sue for the price which had by the award been definitely determined as the value of his labour and of the materials which he had supplied. The object in naming a definite person to fix the amount would be defeated if either party could, without any reason whatever, cancel the agreement to refer in a case like this, and that just at the very time when his decision was about to be given. The only question therefore is whether after having made an agreement of this kind the defendants could, after the work had been nearly completed withdraw from his contract, and appoint another person against, or without, the consent of the plaintiff himself to act as arbitrator between them. Now it is contended that during the course of an arbitration, or at any rate after submission to arbitration, either party can withdraw, leaving the other to his remedy in the ordinary Courts of Law. This does not seem to be the case according to Roman-Dutch Law. I need only refer to *Groenenwegen*, 4, 8, 20; *Wassenaar Practijk, Judicieel, Cap.* XV; *Voet's Compend. Bk.* iv. *Tit.* 8, § 9; *Voet ad Pandectas*, iv. 8, 21; *Van der Linden*, p. 414. Again it is clear that either of the parties could have applied to the Court to compel the referee to perform his functions, or could have applied to the Court for relief against the contract he had entered into by his agreement to submit to arbitration, *if he had just grounds for anticipating some wrong*, but there appears to be no Roman-Dutch Law authority for supposing that, without cause, after a deed of submission like that now before the Court, and after the work had been nearly completed and many certificates given either party could refuse to abide by the decision of this referee, whom they had agreed upon as the person to determine the value of work and material. This certainly would be inconsistent with the general principles laid down in the case of *Long* vs. *Bishop of Cape Town* (1 P. C. (N.S.) 411) by the Privy Council, to which reference was made during the arguments.

Judgment will be for plaintiff for £147 1*s.* 9*d.* and costs.

BARRY, J.P., and MAASDORP, J., concurred.

TURNER *vs.* SMITH.

Provisional Sentence—Copy of document.

Provisional Sentence will not be granted on mere production of a certified copy of the lease, under which a debt is due.

1894. July 12. — Turner vs. Smith.

Application for provisional sentence for £37 10s., rent due under a lease of certain lands. A copy of the lease was produced in court.

Maasdorp, S.G. (for applicant), stated that the original lease was annexed to a bond in the office of the Registrar of Deeds at Cape Town. The copy produced was certified by the Registrar to be correct. This was admissible as evidence, and all that could be procured under the circumstances. If this copy was not sufficient to support provisional sentence, he asked for judgment by default, as the defendant had not appeared.

[*Per Curiam:* This is not an action and final judgment has not been asked for in the summons, so cannot be given by default. As regards the admissibility of the copy of the lease, should there not at least be an affidavit from the Registrar of Deeds, explaining why the original was not produced?]

The application stood over for further evidence.

Posteà (Aug. 1st). The original lease was produced and provisional sentence granted.

MLABA *vs.* MLONSHA.

Procedure—Magistrate's Court.

When a case is set down in the Magistrate's Court for a particular day and on that day it is neither tried nor formally postponed, and nothing of a judicial character takes place, the case lapses and cannot be revived by a notice from plaintiff to defendant that it is set down for another day.

1894. July 12. — Mlaba vs. Mlonsha.

Review of a decision of the Resident Magistrate of

1894.
July 12.

Mlaba vs. Mlonsha.

St. Marks. Respondent (plaintiff in court below) had sued the appellant (defendant in court below) for Provisional Sentence for thirteen head of cattle or £26. On the return day to the summons viz.:—the 13th February, 1894, the case was postponed by the Magistrate till the 8th of March. On the 8th March the Magistrate was absent from St. Marks, attending to various official or semi-official duties; there was no sitting of the Court, and the defendant, who attended with his witnesses, was merely informed by the Magistrate's Clerk that the Magistrate was absent. Subsequently defendant received a letter from the plaintiff's agent telling him the case was set down for 26th April, and on May 2nd received a notice from the Magistrate's Clerk informing him that as he had not appeared on the 26th April the case had been postponed till May 17. Defendant took no notice of either of these letters and on May 17 provisional sentence was granted, he not appearing.

From this judgment he now appealed.

Maasdorp, S.G. (for appellant).

As nothing of a judicial character was done on March 8th, the day to which this case had been postponed, the case lapsed and nothing which had happened afterwards could revive it. The notice for April 26th was not signed by the Magistrate or his Clerk, and in any case nothing short of a new summons, or the consent of the parties to waive the irregularity, would revive it. Consequently everything done after March 8th was null and void.

Burke for respondent.

Appellant had not adopted the proper course; he should have applied to the Magistrate for redress under the 28th or 29th Rule of Court and got the case re-opened. The case was revived by the consent of parties.

BARRY, J.P.: It is unfortunate that the Magistrate disappeared on March 8th. By his disappearance and by nothing of a judicial character being done that day the matter lapsed, and, as there is no evidence of consent of parties to its renewal, there was nothing to justify the Magistrate in treating it on May 17 as a case which came properly before him. The appeal will be allowed and the

proceedings before the Magistrate set aside. Respondent to pay costs.

1894. July 12. Mlaba vs. Mlonsha.

JONES, J., concurred.

QUEEN *vs.* M'GLASHAN.

Act 28 *of* 1883—*Sale of Liquor—Summons.*

In a charge under s. 75, *Act* 28 of 1883, *of selling, dealing in, or disposing of intoxicating liquor without a license, it is necessary to set forth the name of the person or persons to whom it is alleged the liquor has been sold.*

1894. July 14. Queen vs. M'Glashan.

Appeal from a decision of the Resident Magistrate of Dordrecht. William M'Glashan had been convicted of contravening s. 75, Act 28 of 1883, in that "on or about the 6th day of May, 1894, at Elandsfontein, he did wrongfully and unlawfully sell, deal in, or dispose of intoxicating liquors without having a license"; against this conviction he now appealed on the ground that the summons was defective in that it did not set forth the name of the person or persons to whom the liquor was alleged to have been sold.

The Magistrate in his reasons relied on ss. 77 and 93 of the Act, and on *Twine* vs. *Woodstock Municipalet* (9 Juta, 244); *Q.* vs. *Hawkins* (7 Juta, 69); *Q.* vs. *Du Plessis* (9 Juta, 93).

Sampson (for appellant): Sect. 75 of the Act deals with two offences—"Any person who shall, contrary to the provisions of this Act, sell, deal in, or dispose of intoxicating liquors without a license or sell, offer, or expose for sale such liquors at any place where he is not authorised by his license to sell the same shall be liable, etc."; the first is the offence here charged.

The summons states a mere general charge, whereas it is necessary, besides setting forth the offence by its distinctive appellation or description, also to state the facts connected with the offence which are relied on (*Rules of Court*, 56, 57; *Archbold*, 12 ed., pp. 43, 57, 59). Magistrates' Courts

1894. July 14. — Queen vs. M'Glashan.

must follow in this respect the procedure of the Superior Courts; besides, Act 20 of 1856, Sched. B., s. 63, and the forms in Appendix shew that in a Magistrate's Court summons the facts relied on must be set out.

As regards this particular case, in *Q.* vs. *Vipond* (1 Men. 551) a conviction for contravening s. 8, Ord. 54 of 1828 (corresponding to the section under which present charge is brought), was set aside on account of the names of the persons to whom wine was supplied not being stated; and in *Q.* vs. *Bolt* (E. D. Court, August 1888, not reported), a charge under the present section, *Q.* vs. *Vipond* was followed. The only question is, does s. 77 or s. 93 of this Act (which do not seem to have been quoted in *Q.* vs. *Bolt*) make a summons under this Act an exception to the ordinary rule of law? Sect. 77 plainly does not; it merely provides that any transaction in the nature of a sale is sufficient to constitute the offence, even if no money pass. Sect. 93 provides that "in any summons or information it shall be sufficient to set forth the offence charged in the words of this Act or in similar words without inserting or negativing any exception, exemption, or qualification." This does not mean that it is sufficient merely to follow the words of the Act, as in that case the time and place of the alleged offence might be omitted, but, as is illustrated by *Q.* vs. *Forbes* (2 G. 211), it provides that it is not necessary for the Crown to traverse in the indictment exceptions in favour of the prisoner. It is true that in *Q.* vs. *Hawkins* (7 Juta, 71), Villiers, C.J., is reported to have said: "Sect. 93 allows a great latitude in the drawing of summonses," but this was a mere *obiter dictum* and had nothing to do with the decision of the case. *Q.* vs. *Du Plessis*, quoted by the Magistrate, is not in point at all.

Maasdorp, S.G., supported the conviction.

BARRY, J.P.: It appears that *Q.* vs. *Bolt* applies to the present case, and the question is has it been overruled. The only ground for this supposition is the remark of Villiers, C.J., in *Q.* vs. *Hawkins*, which does not even amount to an *obiter dictum*. He states that s. 93 allows a great latitude in the drawing of summonses, but he does not say what this latitude is; so we must presume that if this case came before him he would decide in accordance

1894.
July 14.

Queen *vs.* M'Glashan.

with the authorities quoted that the names of the persons to whom liquor is alleged to have been sold must be stated. The charge as it stands resembles a charge of theft in which the name of the person from whom the property has been stolen is not set forth. The law requires that the nature of the offence should be stated, and this not being stated no offence is stated. S. 93 has been rightly construed by counsel for the appellant; it provides that the Crown need not state in the indictment that the case does not fall within any of the exceptions which are provided in the statute. The entire proceedings including the summons and the conviction will be set aside.

JONES, J., concurred.

MGWEBA *vs.* HLEPU AND OTHERS.

Contribution—Contract—Novation.

A school committee contracted with a schoolmaster to pay him a fixed salary; it was afterwards agreed between him and the committee that he should receive a piece of land in lieu of part of this salary, and he was put in possession of this land by M., a member of the committee. M. subsequently took away the land, and the schoolmaster recovered from him the portion of salary represented by the land. M. now claimed that the other members of the committee should contribute pro ratâ. Held, *that he was not entitled to succeed.*

1894.
Aug. 1.

Mgweba *vs.* Hlepu and others.

Appeal from a decision of the Resident Magistrate of St. Mark's.

It appeared that the appellant and the respondents, fourteen in number, had been members of the school committee of Nququ in the district of St. Mark's. In April, 1892, the committee engaged one Matoti as schoolmaster, agreeing to pay him, in addition to the government grant, £10 a year as salary. They afterwards agreed that instead of £5 of this he should receive a piece of land for cultivation. Mgweba, who as head man appeared to manage the distribution of land, put him in possession of a piece of land, with what title did not appear

1894. Aug. 1.

Mgweba *vs.* Hlepu and others.

in evidence. Afterwards Mgweba took it away again and gave it to one Booy Mkefa, arranging that Mkefa should pay the schoolmaster £5 a year. The schoolmaster confirmed this arrangement by receiving from Mkefa £3. He was, however, schoolmaster for five terms altogether, and as this £3 was all that he received in lieu of the land, he sued Mgweba personally in February, 1894, for the balance of salary £3 5*s.*, and got judgment for this amount with costs. On June 12, 1894, Mgweba sued the fourteen respondents before the Resident Magistrate of St. Mark's in an action to enforce payment by them of a *pro ratâ* share of this £3 5*s.* costs, and incidental loss suffered through seizure of his goods to satisfy the judgment. For the defendants (now respondents) exception was taken that "plaintiff's claim arose out of a matter heard in this Court on the 8th February, 1894, and as that claim was for land plaintiff had wrongfully taken from one Shadroch Matoti it was a personal matter and cannot form the basis of the present action." The Magistrate upheld the exception.

From this decision the plaintiff now appealed.

The records in the case tried in February between Matoti and the present appellant were produced. The summons in it set forth the original contract with the committee to pay Matoti £10 a year, the agreement to get a piece of land as an equivalent for half this, the subsequent wrongful taking away of the land by Mgweba, and finally claimed £3 5*s.* balance after deducting £3 paid by Booy Mkefa. In his evidence Mgweba stated "I admit I gave the land to Booy Mkefa; he was to pay the school fees to plaintiff and has not done so."

King (for appellant): The Magistrate in upholding the exception virtually decided that the action in February was an action *in tort*, and that so there could be no sharers in Mgweba's responsibility. That action claimed a balance of salary, and, though the summons stated facts about the giving and taking away of the piece of land, clearly went back to the original agreement with the committee, and was an action founded on contract. Consequently the doctrine of contribution applied according to both English and Roman-Dutch law. Mgweba might in February have

claimed that the respondents should be made co-defendants; he had not done so, but had chosen the alternative remedy of calling on them to contribute. The Magistrate should not have decided the case on exception, but called for evidence to see if the respondents were parties to the original contract, and so liable for their share of the £3 5*s.* at all events.

1894. Aug. 1. Mgweba *vs.* Hlepu and others.

Burke (for respondents) was not called upon.

JONES, J., (after stating the facts): The Magistrate may have been wrong in his original decision of the case in February, but we have to see if the plaintiff has a right to sue in the present action. Mgweba bases his claim on the original action of February. It must be obvious that originally the contributories would all have been liable for payment of the sum promised, but the schoolmaster accepted the piece of land in lieu of this, thereby creating a novation of the original contract. Then the land was given to Booy Mkefa, who was to pay the schoolmaster £5 a year, and this amounted to a second novation of the contract, consequently there was no action against the fourteen respondents. Mgweba admitted that he gave the land to Booy Mkefa, so the wrong was done by him. The appeal must be dismissed with costs.

MAASDORP, J., concurred.

Re DICKSON, *Ex parte* GOODYER.

Receiver appointed in England—Process in aid.

Although the Court will confirm the appointment of a receiver or trustee in insolvency appointed in England, it will not confer on him unusual powers unless the Colonial creditors are represented at the application and it be shewn that they will not be prejudiced thereby.

This was a petition from Thomas E. Goodyer setting forth that he had been duly appointed by the High Court of Chancery of England receiver in the estate of Dickson & Co., a firm carrying on business both in England and Cape

1894. Aug. 1. *Re* Dickson.

1894. Aug. 1. — Re Dickson.

Colony; and that by an order made by Mr. Justice Stirling of the said Court, he had been empowered to raise a sum of not more than £6000 in order to carry on the business of the said firm, this sum with interest at 5 per cent. to be a first charge on the property of the firm; he now prayed for a confirmation of this order by this Court.

Maasdorp, S.G., for petitioner, pointed out that as a receiver here has no power over immovable property, an order of the Court was necessary, and referred to *Re Howse & Co.* (3 E. D. C. 367), where an order had been made confirming the appointment of a receiver appointed by the English Bankruptcy Court.

[*Per Curiam:* But here you ask for powers which would not belong to a trustee under our Insolvency Ordinance. How are we to know that the rights of Colonial creditors will not be prejudiced by our making this order? They are not represented here.]

The case was allowed to stand over.

Posteà, August 8th. The application was renewed, but was refused on the ground that all the Colonial creditors were not before the Court.

ENGELBRECHT *vs.* ENGELBRECHT.

Practice—Pauper Action—Edictal Citation.

Leave to sue by edictal citation will in pauper cases be granted at the same time as the granting of the rule nisi; *thereby enabling notice of the rule* nisi, *and the intendit to be served together.*

Petition for a rule *nisi* to enable plaintiff to sue in *formâ pauperis* in an action for restitution of conjugal rights and failing this divorce.

1894. Aug. 1. — Engelbrecht vs. Engelbrecht.

Hayton, for applicant, asked that leave to sue by edictal citation should be granted at the same time, so that intendit could be served together with the notice of the rule *nisi*. He referred to the practice of the Supreme Court, reported in 6 Juta, p. 61.

The application was granted.

QUEEN. *vs.* CANNON.

Act 33 *of* 1892—*Location—Native Voter—License.*

Notwithstanding the provisions of Act 39 *of* 1887 (*The Native Registered Voters Relief Act*) *the owner of property on which a native location is established is not exempt from the necessity of taking out an annual license in respect of such male adults living in the location as are registered voters.*

SEMBLE. *Even a person of European nationality or extraction, inhabiting a dwelling within the local limits of any native location, is subject to all the provisions of the Native Locations Act,* 1884.

1894.
Aug. 1.
„ 30.

Queen *vs.*
Cannon.

Review of a decision of the Resident Magistrate of Alexandria. The accused was convicted of contravening s. 10, Act 33 of 1892, in that, he being an owner of land, on which a native location on private property was established, did allow this location to be occupied by a greater number of male adults than was authorised by the terms of his license.

From the facts, which were not in dispute, it appeared that the appellant had a native location established on his property, and had taken out an annual license authorising him to have twenty-four male adults in occupation of the location. He actually permitted twenty-six to occupy it, but in respect of two of these, he claimed that he need not take out a license, as they were registered voters, and so exempt from this license under the provisions of the Native Registered Voters Relief Act (No. 39 of 1887). S. 1 of this Act provides "that no person, whatsoever be his nationality, tribe or colour, and whether he be or be not a native, Kafir, Fingo, Basuto, Hottentot, Bushman, or the like, shall, so long as he shall be duly registered under the law of the Colony as a voter at any Parliamentary election for the return of any member for any constituency to the Parliament of this Colony, be in any other way, or to any greater extent subject to the operation of any laws, including the laws mentioned in Schedule A to this Act, than any such duly registered voter of European nationality or extraction, may, or might be . . . . " Among the Acts included in

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Schedule A is the Native Locations Act (No. 37 of 1884), of which the Act under which the present charge was brought is an amending Act, and with which it is to be read as one. The interpretation of s. 4, Act 39 of 1887, was also raised in argument; this section provides "that every person, whether he be or be not, a native, Kafir, Fingo, Basuto, Hottentot, Bushman, or the like, who shall reside or dwell in, or inhabit any hut or dwelling within the local limits of any native location, as defined in the second or seventh sections of the Native Locations Act, 1884, shall be equally subject to the operation of all the provisions of the said Act, as though he were an occupier of such hut or dwelling, and were of any nationality referred to in the second or seventh sections. The Magistrate held that the accused was obliged to take out a license for all the male adults occupying the location, including the two who were registered voters. From this decision the present appeal was taken.

Sampson (for appellant). By Act 39 of 1887, native registered voters are exempted from the operation of certain Acts mentioned in the Schedule, or at least are placed on the same footing as Europeans with respect to them. Act 37 of 1884, is included in the Schedule, and as s. 19 of the Act under which this charge is brought provides that it is to be read as one with No. 32 of 1884, native voters are exempt from the provisions of this Act, too; consequently no tax or license is necessary in respect of such voters living in a location, except the hut-tax, which is especially reserved by s. 3. That Act 30 of 1887 is intended to exempt voters who live in a location is plain from the other Acts included in Schedule A, which refer to natives living in a location; and that it operates, not merely in favour of the native voter himself, but also of third parties in their dealings with reference to him (as the owner of land here) is shewn by the insertion in Schedule A of Act 28 of 1883, which prohibits the sale of liquor to natives. As to s. 4 it does not take away from a voter, who lives in a location, the privileges given to voters by s. 6, but merely provides that the class of vagrant inhabitants who reside or dwell within the limits of a location, but are not permanent enough to be actually occupiers, shall be treated as occupiers.

[*Per Curiam:* May s. 4 not mean that although a location must originally be constituted of natives, after its constitution any European or other person occupying it is to be subject to the provisions of the Act of 1884? S. 1 says a native voter is to be treated as if he were a European; would not a European living in a native location require to have a license taken out for him, even if he were a voter?] If that were so, s. 1, placing native voter on a level with European would be absolutely unmeaning, as it would confer no privilege whatever on him.

Maasdorp, S.G., for Crown. If a native voter lives in a location, he forfeits the benefit of the exemption in Act 39 of 1887. The Act makes a distinction between the native as a unit, and the native living in a location. To a native voter as a unit, certain privileges are given, and provision is made in the Act for his resigning these by lodging an objection to having his name on the register. He can also forfeit them under s. 4, by going back to his pristine state, and living in a location. S. 4 means that even a European, if he lives in a location, is subject to all the provisions of the Act of 1884. It is noteworthy that s. 9, Act 33 of 1892 (prescribing amount of license), does not say "twenty shillings for every native," but "twenty shillings for every *male adult.*"

Cur. adv. vult.

Posteà (Aug. 30).

JONES, J., delivering the judgment of the Court,—

This was a matter argued on review, which came before us from the Resident Magistrate's Court of Alexandria. The accused was charged with contravening s. 10, Act 33 of 1892, by allowing a larger number of male adults, a native location duly established by proclamation, upon the private property of the accused than were allowed under the license taken out by him. S. 10 is as follows:—

"Every owner of land on which a native location on private property is established who allows such location to be occupied by a greater number of male adults than is authorised by the terms of his license shall be liable for every such offence to a penalty of not exceeding twenty pounds sterling."

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The accused was authorised under his license to have twenty-four male adults in his location, but in fact there were twenty-six, the two over the number specified in the license being registered parliamentary voters. The contention is that the accused is not by law required to take out a license for these two registered voters, and reliance is placed upon the Native Registered Voters Relief Act of 1887. The provisions of this Act are somewhat peculiar. The preamble is as follows :—

"Whereas it is expedient to exempt every native voter duly registered as such for the election of members for the Parliament of this Colony from the operation of certain laws, save in so far as the said laws or any of them would have operation in respect of any registered voter of European nationality or extraction."

And the enacting clause of s. 1 provides :—

"From and after the 1st day of September, 1887, no person whatsoever be his nationality, tribe, or colour, and whether he be or be not a native Kafir, Fingo, Basuto, Hottentot, Bushman, or the like, shall, after he has been, and so long as he shall remain duly registered under the law of this Colony for the time being as a voter at any parliamentary election for the return of any member for any constituency to the Parliament of this Colony, be in any other way or to any greater extent subject to the operation of any laws including the laws mentioned in Schedule A to this Act, than any such duly registered voter of European nationality or extraction may or might be; provided that any native voter, whose name shall appear on any list framed by any registering officer, may, either personally or by an agent authorised in writing, appear at the time and place duly fixed by such registering officer, in accordance with the law, for the reception and hearing of claims and objections to such list, and hand in a written objection in the form set forth in Schedule B to this Act, upon receiving and hearing which objection such registering officer shall, on being satisfied of the identity of the person raising such objection, withdraw and erase the name of such person from such list, and no such person, whose name shall have been erased, shall be deemed to be exempt from the operation of the laws aforesaid merely by reason that his name shall have been at first placed upon the list framed by such registering officer."

But following these very wide provisions we have s. 4, which enacts as follows :—

"Every person, whether he be or be not a Kafir, Fingo, Basuto, Hottentot, Bushman, or the like, who shall reside or dwell in or inhabit any hut or dwelling within the local limits of any native location, as defined in the 2nd or 7th sections of the Native Locations Act, 1884, shall be equally subject to the operation of all the provisions of the said Act as though he

were an occupier of such hut or dwelling and were of any nationality referred to in the 2nd or 7th sections."

This would therefore make every person, of whatever nationality, who chose to reside or dwell in any hut or dwelling within the local limits of any native location, subject to the operation of all the provisions of the Act. Most of the privileges apparently conferred by s. 1 are taken away by s. 4. At any rate it would seem there is nothing to exempt Europeans from the operation of the Acts if they live in huts in a native location. The fact that Act 33 of 1892 is to be read as one with the Native Locations Act of 1884 will not affect the argument. Now, s. 7 of Act 33 of 1892 contains the following provisions :—

"Every owner of land on which a native location on private property is established at the taking effect of this Act, or on which such a location may be established or constituted hereafter shall in addition to the license of the Governor required by the Native Locations Act, 1884, be bound and obliged to take out an annual license for such location, to be issued by the Distributor of Stamps for the district or some other duly authorised officer." And with reference to the annual license section 9 provides: "There shall be paid for every such license the sum of twenty shillings for every male adult, but in regard to any location established after the taking effect of this Act no license shall authorise more than forty such male adults to be at any time in occupation of such location."

It follows, therefore, that even in respect of registered voters the tax must be paid. It must be noticed that even under two provisions of s. 3 of Act 39 of 1887 the registered voter was not exempt from liability to pay hut tax, imposed upon him by virtue of the provisions of Act 37 of 1884, or of any other law of this Colony. The Magistrate's decision must therefore be confirmed.

MAASDORP, J., concurred.

SAUNDERS *vs.* MACKAY.

Libel—Justification—Measure of Damages.

Where a medical man allows a laudatory paragraph about himself to appear uncontradicted in a newspaper, attributing to him higher qualifications than he possesses, this justifies a writer to a newspaper in accusing him of falsely giving himself forth as possessing these qualifications.

Where a medical man or his accountant by mistake sends in a bill to a patient twice as large as it ought to be, and the mistake when pointed out is at once rectified, this mistake does not justify a person, writing after the mistake is corrected, in accusing the medical man of sending out a bill to a patient "when he knows that he could not recover the amount, or half the amount in a Court of Law."

In estimating damages suffered by the falling-off of income resulting from libel, the falling-off which is due to the part of the libel held to be justified, must be deducted from the total damages.

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In this action the plaintiff, Frederick Anastasius Saunders, a physician and surgeon practising in Grahamstown, claimed from the defendant, Charles Robert Mackay £1500 damages, sustained by the plaintiff, owing to the defendant's having printed and published of the plaintiff certain false and malicious statements. The statements complained of were contained in two letters written by the defendant to *The Journal*, a newspaper published in Grahamstown, on the 8th and 22nd days of May, 1894, respectively, and in a leaflet published by the defendant with his signature attached, on the 25th May, embodying the letter to *The Journal* of the 22nd May, with some additional matter, which the editor of that paper had excised from the letter. The plaintiff's declaration was as follows—

1. The plaintiff is a licentiate of the Royal College of Physicians of Edinburgh, and a licentiate and Fellow of the Royal College of Surgeons of Edinburgh, and has been duly licensed to practise in this Colony as a physician and surgeon, and at the time of the grievances hereinafter mentioned was, and still is, practising as such physician and surgeon in Grahamstown.

2. The defendant resides in Grahamstown.

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3. On or about the 8th May, 1894, and at Grahamstown aforesaid, the defendant, in a certain newspaper called *The Journal*, falsely and maliciously printed and published of and concerning the said plaintiff, and of and concerning him in his said profession of physician and surgeon the words following, that is to say:—

"A local medical man," meaning thereby the plaintiff, "not a Doctor be it noted, although with much display and trumpet shouting, *à la mode* the vendors of nostrums, he gave it forth some two years since in the columns of a contemporary that he is a doctor, recently tendered an account of sixteen guineas to a working man whom he had pumped ten times. The working man, it would appear, did not object to having his 'inner man' pumped ten times, but he did object to having his pocket pumped to the tune of sixteen guineas. Accordingly he remonstrated about the financial pumping part of the transaction and the bill was reduced to one-third its original amount * * * The medical man knew full well that he could never reclaim in a Court of Law sixteen guineas or the half of it from the man ten times pumped * * * The canons of common sense are not for a moment to be considered when one is fortunate enough to be in the hands of a self-styled doctor, who is in possession of a testimonial written by a man that never lived."

4. The defendant meant thereby, and imputed—

(*a*) That the plaintiff was not a duly qualified physician and surgeon, and that he had by means of false and fraudulent diplomas and certificates, obtained the approval of the Colonial Medical Council to his being admitted to practise as such physician and surgeon, and had by these false and fraudulent means obtained a license to practise as such.

(*b*) That the plaintiff had rendered a false and fraudulent account to a certain workman, with the object of obtaining from him payment of the sum of sixteen guineas, which was three times the amount to which he, the plaintiff, was legally entitled, and had by means of the said fraudulent account, attempted to defraud the said workman of the sum of £11 4*s.* sterling.

(*c*) That the plaintiff is in possession of a false and fraudulent testimonial, purporting to be signed by some medical authority, which medical authority never existed, and that he is in the habit of fraudulently using the said testimonial for his own advantage and profit.

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5. Further, on or about the 22nd of May, 1894, and at Grahamstown, in the said *Journal*, the defendant falsely and maliciously printed and published of and concerning the plaintiff, and of and concerning him in his said profession of physician and surgeon the words following, that is to say:—

"I now endorse all those allegations"—meaning amongst others the allegations mentioned in the third paragraph of this declaration—"under my own name * * I consider the medical profession the most honourable of all professions, and for this reason was I anxious that its fair escutcheon should not be trailed in the gutter of Grahamstown by any self-seeking individual"—meaning thereby the plaintiff—"who catered to a druggist for commission on his prescriptions, or who indulged in various other unprofessional practices of which I shall probably have something to say elsewhere on a future occasion. He has announced that he is a Doctor of Medicine, and has had degrees conferred upon him. I assert that he is not a Doctor of Medicine, that he has not had any degree whatever conferred upon him, and that he has not received either theoretically or practically the training of a University graduate in medicine."

6. The defendant meant thereby and imputed—

(*a*) The innuendo as set forth in paragraph 4 above, and which plaintiff prays may be considered as here repeated.

(*b*) That the plaintiff was a disgrace to the medical profession, and had trailed the honour of the profession in the mud.

(*c*) That the plaintiff had entered into an unprofessional arrangement with some druggist, under which the plaintiff undertook to send all his prescriptions to the said druggist, to be made up by him in consideration of the said druggist paying the plaintiff a commission on the drugs dispensed by him under the said prescriptions, to the injury of the plaintiff's patients.

(*d*) That the plaintiff has been guilty of various other unprofessional practices.

(*e*) That the plaintiff has falsely and fraudulently represented himself as holding the degree of doctor of medicine conferred upon him by some university.

7. Further, on or about the 25th of May, 1894, and at Grahamstown, the defendant, in a printed slip entitled "Medical Fees," falsely and maliciously printed and

published of and concerning the plaintiff, and of and concerning him in his profession of physician and surgeon, the words following, that is to say :—

"I now endorse all those allegations"—meaning the allegations mentioned in the third paragraph of this declaration—"under my own name * * I consider the medical profession the most honourable of all professions and for this reason was I anxious that its fair escutcheon should not be trailed in the gutter of Grahamstown by any self-seeking individual" —meaning the plaintiff—"who catered to a druggist for commission on his prescriptions or who indulged in various other unprofessional practices of which I shall probably have something to say elsewhere on a future occasion. Mr. Tamplin's darling"—meaning the plaintiff—"has announced that he is a Doctor of Medicine and has had degrees conferred upon him. I assert that he is not a Doctor of Medicine, that he has not had any degrees whatever conferred upon him, and that he has not received either theoretically or practically the training of a University graduate in medicine. Unfortunately for himself Mr. H. T. Tamplin's information"—meaning the information contained in a letter addressed by Herbert Travers Tamplin, Barrister-at-law to the said journal, and appearing in its issue of the 10th May, 1894—"on the subject of medical qualification is second-hand, and he seems to have learned his lesson after the manner of a patient and unquestioning parrot. If he seeks to further espouse the cause of his friend the self-styled doctor"—meaning the plaintiff—"I will undertake to furnish him with ample material for controversy in the shape of a pamphlet of such an exhaustive nature that, even as the sheep before its shearer is dumb, so will the self-paraded, self-advertised 'doctor' apply by silence more piteous than speech for the mercy which he so little deserves."

8. The defendant meant thereby and imputed—

(*a*) The innuendo set forth in paragraph 4 above, and which the plaintiff prays may be considered as here repeated.

(*b*) The innuendo set forth in paragraph 6 above, and which the plaintiff prays may be considered as here repeated.

9. In consequence of the premises, the plaintiff has been and is greatly prejudiced and injured in his credit and reputation, and in his profession of physician and surgeon as aforesaid, to the damage of the plaintiff in the sum of £1500 sterling.

10. The plaintiff prays.

(*a*) The said sum of £1500 as and for damages, as aforesaid.

(*b*) General relief and costs of suit.

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The defendant pleaded.

1. The defendant is a journalist, and is meanwhile residing in Grahamstown for the benefit of his health.

2. The defendant admits paragraphs 1 and 2 of the plaintiff's declaration.

3. As regards paragraphs 3, 5 and 7 of the plaintiff's declaration, the defendant denies that the libels alleged to be contained in such paragraphs were written and published by him, of and concerning the plaintiff; but, if it be found by this honourable Court, that the alleged libels contained in such paragraphs do refer to the plaintiff, the defendant pleads that such paragraphs were not written and published by him in the calumnious and actionable sense attributed to them by the plaintiff, nor in the defamatory sense imputed by the innuendoes in the 4th, 6th and 8th paragraphs of plaintiff's declaration, but were written and published in a public newspaper, as fair comment upon a public man, without malicious motive or intent, in the public interest, and for the public good.

4. And if the above plea be not found sufficient, but not otherwise, the defendant pleads that if the words complained of be found to refer to the plaintiff, then they are true in substance, and in fact, and were written without malice, in the public interest, and for the public good.

5. And in further reply to the third paragraph of plaintiff's declaration, the defendant says that certain correspondence was conducted in a local newspaper called *The Journal*, under the heading "Medical Touting," and on or about the 21st day of April, 1894, a certain letter appeared in the said newspaper, *The Journal*, under the above heading, signed "Amphion," wherein the writer stated that there is no appeal at law against the extortionate charges of medical men. In consequence of such letter signed "Amphion," the defendant wrote on the 4th day of May, 1894, a letter to the editor of the said newspaper, *The Journal*, which letter was, with slight alterations and deletions, published by the said editor, in his said newspaper on the 8th day of May, 1894, extracts from which letter are now complained of, and set forth in the third paragraph of plaintiff's declaration. These, the said extracts contained in the said paragraph are wrenched from their context, and are thus

shorn of their true meaning and import, and the defendant therefore claims to be allowed to refer to the said letter as a whole, as also to the letter signed "Amphion," and to all the correspondence that appeared in the said newspaper, *The Journal*, under the headings "Medical Touting" and "Medical Fees."

6 (*a*) In reply to innuendo (*a*) of the fourth paragraph of plaintiff's declaration, the defendant denies such innuendo *in toto*, as being an absolutely false and fallacious deduction from the premises; since the defendant, if he did write anything of and concerning the plaintiff, did say of the plaintiff that he is a college licentiate in medicine, and a medical man.

(*b*) In reply to innuendo (*b*) of the fourth paragraph of plaintiff's declaration the defendant denies such innuendo, but says that if his correspondence be found to refer to the plaintiff the charge of sixteen guineas for pumping a working man ten times was an exorbitant charge and one that could not be recovered in a Court of law, but the defendant did not imply, if he implied anything, that the charge of sixteen guineas was £11 4*s*. in excess of a just and recoverable charge.

(*c*) In reply to innuendo (*c*) of the fourth paragraph of plaintiff's declaration, the defendant denies such innuendo, but says that if his correspondence be found to refer to the plaintiff, then the plaintiff had published, or caused to be published of and concerning himself a false and misleading newspaper puff, wherein it was stated that he possessed a testimonial purporting to be written by a man who never existed.

7. In regard to paragraph 5 of the plaintiff's declaration the defendant prays that paragraphs 3, 4 and 5 of this his plea may be considered as repeated here.

8. (*a*) In reply to innuendo (*a*) of the sixth paragraph of plaintiff's declaration the defendant prays that paragraph 6 of this his plea may be considered as inserted here.

(*b*) In reply to innuendo (*b*) of the sixth paragraph of plaintiff's declaration the defendant denies such innuendo.

(*c*) In reply to innuendo (*c*) of the sixth paragraph of plaintiff's declaration, the defendant denies such innuendo, but says that if his correspondence be found to apply to the plaintiff, that the plaintiff did enter into an arrangement

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with a druggist, by which arrangement he did receive commission on his prescriptions.

(*d*) In reply to innuendo (*d*) of the sixth paragraph of plaintiff's declaration the defendant denies such innuendo.

(*e*) In reply to innuendo (*e*) of the sixth paragraph of plaintiff's declaration the defendant denies such innuendo, but says that if his correspondence be found to apply to the plaintiff, that the plaintiff did falsely represent himself to be a doctor of medicine, and as one who had medical degrees conferred upon him, when he knew full well that he was not, and is not, a doctor of medicine, and that he had not any degrees conferred upon him, but possessed licenses which permit of his practising medicine and surgery.

9. In reply to paragraph 7 of the plaintiff's declaration, the defendant prays that paragraphs 3, 4 and 5 of this his plea may be considered as repeated here.

10. In reply to paragraph 8 of the plaintiff's declaration the defendant prays that paragraphs 6 and 8 of this his plea may be considered as repeated here.

11. In reply to paragraph 9 of the plaintiff's declaration the defendant denies such paragraph.

12. Wherefore defendant prays for judgment with costs.

The Replication was general.

In support of his plea of justification the defendant relied upon the following facts, which were proved in evidence.

The plaintiff, who had been practising as a physician in Scotland for about nine years, came to Grahamstown at the end of June, 1892, and shortly after his arrival entered into partnership with Dr. Edwin Atherstone. Before leaving Scotland Professor Meiklejohn, a friend of plaintiff, suggested to him that he ought to have printed copies of his testimonials, in case he applied for any public post in the Colony, and undertook to superintend their publication. About two hundred copies of these testimonials were printed, one of which the plaintiff, without looking through it, sent to his wife, who had preceded him to Grahamstown, and by her it was shewn to Dr. Edwin Atherstone. After the plaintiff's arrival in Grahamstown at least two other copies were in the hands of Grahamstown people. The title-page

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of this book of testimonials was headed "Dr. Saunders, F.R.C.S.," and described him amongst other things as "late Demonstrator of Histology, University College;" and the book contained a preface in which were the words "after I had taken out my degrees in London I proceeded to Edinburgh;" also in several places where the original testimonials had "Mr. Saunders" in the printed copy this was altered to "Dr. Saunders."

The plaintiff is a Licentiate of the College of Physicians, Edinburgh, and a Licentiate and Fellow of the Royal College of Surgeons, Edinburgh, but has no University degree in medicine or anything else, and no right except by courtesy to the title of Doctor. He is not a Fellow of the Royal College of Surgeons, England, as the defendant maintained was implied by F.R.C.S., nor had he been a demonstrator in Histology, but merely an assistant-demonstrator at University College, Liverpool.

Shortly after his arrival in Grahamstown plaintiff shewed his original testimonials, and possibly, he admitted, a copy of the printed testimonials to a Mr. Richards, whom he met in the boarding-house in which he was staying. Mr. Richards, being a pressman, founded on these a laudatory paragraph announcing Dr. Saunders' intention to practise in Grahamstown, and brought it for insertion to Mr. Grocott, the proprietor of *Grocott's Penny Mail*, a Grahamstown newspaper. Mr. Grocott inserted it on July 6th, having first told Mr. Richards he would charge for it as an advertisement, and some months after Mr. Richards paid £2 for the insertion. This paragraph contained all the mis-statements of the printed testimonials; it also stated that plaintiff had a testimonial "from the Professor of Surgery of the University of Edinburgh—Professor Chime,"—Chime being printed instead of "Chiene," which is really the Professor's name; and, referring to the plaintiff's conduct of an operation of tracheotomy, said "Her Majesty on this occasion directed the Duke of Richmond and Gordon to send a letter to Dr. Saunders conveying her appreciation of his courage and devotion;" this latter statement was untrue, as the letter in question was written by the Duke of Richmond and Gordon, and did not purport to contain any message from Her Majesty. This paragraph occasioned a good deal of criticism, and subsequently letters appeared in

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the *Penny Mail* from Mr. Richards, taking the full responsibility for its insertion, and from Dr. Saunders denying that he had inserted or been the cause of inserting it; he did not, however, correct any of the mis-statements in it. At the trial Dr. Saunders gave evidence to the effect that he did not know it was paid for as an advertisement, and that he had not paid anything for the purpose of having it published.

With regard to the other allegations, defendant in his particulars stated that the charge about the exorbitant bill referred to the case of one Pettaway. Pettaway, a working man, received a bill from Dr. Saunders for £16 4*s*., for attendance on himself, including pumping him out or washing him out some five or ten times (the evidence as to the number of times varied) and for attendance on his wife during her confinement. On receiving this bill he shewed it to Dr. Gillespie, Dr. Saunders's assistant, who at once said the items were incorrect, and handed it for rectification to Mr. Heany, the book-keeper to the firm. Mr. Heany corrected the bill, which ought to have been £8, and it was subsequently reduced to £5 11*s*.; all this happened before the publication of the first libel.

As to the "catering to a druggist," it was proved that before Dr. Saunders's arrival in Grahamstown all the Grahamstown doctors received a percentage from the leading chemist on their prescriptions. Dr. Atherstone had an arrangement to this effect with Wells & Co., and though this fact seems not to have been told to Dr. Saunders for some months after his joining the partnership, still a percentage was paid to the partnership funds on his prescriptions. It was shewn that in two years Dr. Saunders had sent eight hundred prescriptions (which, however, Dr. Atherstone admitted would be a small proportion of the whole number issued) to another chemist, who paid no commission. The defendant led evidence to shew that Dr. Saunders frequently changed his prescriptions, and gave medicine unusually diluted and so in larger quantities, in order to swell his percentage; but this was not proved to the satisfaction of the Court.

This case lasted five days and numerous witnesses were called, but all the material facts proved will be found in the judgment of the Court.

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Maasdorp, S.G. (with him *Sampson*), appeared for the plaintiff.

The defendant in person.

Posteà (August 14).

JONES, J. (sitting alone in the absence of MAASDORP, J., through illness), by consent read the judgment of the Court; formal judgment was pronounced on August 16.

In this action the plaintiff, who is a Licentiate of the Royal College of Physicians, Edinburgh, and a Licentiate and Fellow of the Royal College of Surgeons, Edinburgh, and licensed in this colony to practise as a physician and surgeon, sues Mr. C. R. Mackay, a journalist, for £1500 damages for libel contained in two letters which appeared in *The Journal* (a newspaper published in Grahamstown) on the 8th and 22nd May last, and in a leaflet (which represents this last letter with a few additions), issued by the defendant after the second letter appeared. In these two letters, and the leaflet, are certain statements which, if published falsely and maliciously of and concerning the plaintiff in his profession, would undoubtedly be libellous. The defendant pleads, firstly, that these letters were not written "of and concerning the plaintiff"; but after carefully weighing the evidence before it the Court considers that it is sufficiently proved that they were written by the defendant, of and concerning the plaintiff, and that any person who knew the plaintiff and the circumstances mentioned in these letters, would see at once that they were intended to refer to him, and to no one else. The letter of the 8th of May contains the following: "Happily, however, it is but seldom that one has reason to question the accounts of a doctor of medicine. It is generally the smaller fry of the medical profession, the licentiates of colleges, self-styled doctors . . . that are extortionate in their charges. A local medical man, not a doctor, be it noted . . . gave it forth some two years since, in the columns of a contemporary, that he is a doctor, recently tendered an account for sixteen guineas to a working man, whom he had pumped ten times." A person who was acquainted with the qualifications of our local medical men would know that the plaintiff was a licentiate and not a doctor of medicine, and that about two years ago a para-

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graph appeared in the *Penny Mail*, referring to his qualifications, with an undue amount of amplification, and that the excessive tribute of praise which it contained created some considerable discussion, and no small amount of adverse criticism. Persons, also, who knew of the charges for stomach-washing which had been made to a working man named Pittaway, would at once connect the statements made in the letters with the plaintiff. The plaintiff and his partner knew at once that the letters referred to the plaintiff, and it would have been indeed strange if they had not understood the allusions. But if there was any doubt about this question, which there certainly is not, it has been completely set at rest by the nature of the defendant's cross-examination, and the evidence he has called to prove that the allegations contained in the letters and leaflet are strictly true with reference to the plaintiff. The second pleas of the defendant are that the paragraphs complained of were "not written and published by him in the calumnious and actionable sense attributed to them by the plaintiff, nor in the defamatory sense imputed by the plaintiff's innuendos, but were written and published in a public newspaper, as fair comment upon a public man, without malicious motive or intent, in the public interest and for the public good; and he pleads further, that if the above pleas be found insufficient, that the allegations in the letters are true in substance and in fact, and were written without malice, in the public interest and for the public good." In order to determine whether these pleas of the defendant are supported by the evidence, it will be necessary to examine in detail the statements made in the letters complained of, and to consider the innuendos stated in the fifth declaration, and the meaning attributed to the same words by the defendant in the pleas he has filed. At the same time I shall deal with the evidence adduced by both the plaintiff and defendant in support of their respective allegations. The plaintiff first complains of the following words, in a letter of the 8th May: "A *local medical man*, not a doctor, be it noted, although with much display and trumpet-shouting *à la mode* the vendors of nostrums, he gave forth, some two years since, in the columns of a contemporary that he is a doctor, recently tendered an account of sixteen guineas to a working man

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whom he had pumped ten times. The working man, it would appear, did not object to having his 'inner man' pumped ten times, but he did object to having his pocket pumped to the tune of sixteen guineas. Accordingly, he remonstrated about the financial pumping part of the transaction, and the bill was reduced to one-third its original amount." The next few words are in *The Journal*, but are not complained of in the declaration. "And how kind of the medical man!" ejaculate a few of our unsuspecting sisters. "Not by any means, 'kind,' dear, unsuspecting sisters." [The declaration continues.] "The medical man knew full well that he could never reclaim in a Court of law sixteen guineas, or the half of it, from the man ten times pumped." The next sentence in the letter is not set out in the declaration, but has been referred to as shewing malice on the part of the defendant. It is as follows: "I learn that the same doctor considers himself justified in removing one's uvula without consulting one on the subject. To have one's uvula removed without one's approval, and to be charged a couple of guineas for the operation, is not, in the light of common sense, either the simplest or cheapest method of conferring a benefit upon one." The next sentence complained of is the declaration: "But then the canons of common sense are not for a moment to be considered when one is fortunate enough to be in the hands of a self-styled doctor, who is in the possession of a testimonial written by a man who never lived." At present I must not refer to the reading of this letter. The plaintiff contends that these separate and distinct false charges are made against him in these sentences, and I shall deal with them separately. He says, first, that the defendant meant and imputed that he was not a duly qualified physician and surgeon, and that he had by means of false and fraudulent diplomas and certificates obtained the approval of the Colonial Medical Council to his being admitted to practise as such, and had by these fraudulent means obtained a license to practise. The plaintiff also complains of a somewhat similar charge having been made in the letter of the 22nd May, and being contained in the following words which appear in that letter: "He has announced that he is a doctor of medicine, and that he has had the degrees conferred upon him. I assert

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that he is not a doctor of medicine, that he has not had any degree whatever conferred upon him, and that he has not received, either theoretically or practically, the training of a university graduate in medicine." These words are said in the declaration (par. 6*a*) to mean that the plaintiff had falsely and fraudulently represented himself as holding the degree of doctor of medicine conferred upon him by some university. The same words, I may add, were repeated by defendant in the leaflet. The defendant contends that the innuendo suggested by plaintiff (in par. 4*e*) is incorrect, because he (defendant) had alleged that plaintiff was a "college licentiate" and a medical man, and as to the construction placed upon the letter of the 22nd May, defendant goes further, and says that the plaintiff "did falsely represent that he was a doctor of medicine, and had medical degrees conferred upon him when he knew full well that he was not, and is not a doctor of medicine, and that he had not any degree conferred upon him," but possesses licenses which permit of his practising medicine and surgery. Upon looking at the letter of the 8th May, it will be seen that the person who is stated to have rendered the account is alleged to be "not a doctor of medicine," but at the same time it clearly conveys the impression that he is a licentiate of a college; in fact the plaintiff himself in the witness box admitted that one of the grounds for knowing he was referred to in the letter, was the reference to licentiates of colleges. It is also clear from the words set out in the declaration that the person referred to is a local medical man. The first innuendo (par. 4*a*) in plaintiff's declaration therefore seems to be incorrect. The true sense of the words is not that put upon them of the plaintiff. There is in fact no imputation that plaintiff was not a qualified physician and surgeon, as the person referred to is admitted to be a licentiate. There is an allegation that he is not a doctor of medicine, as he has never had any such degree conferred upon him by anybody legally entitled to confer such a degree. Colloquially, no doubt, he would be called doctor, in the sense that he has been duly licensed to practise medicine, or as being one whose "occupation it is to cure disease (sub verb. Doctor Ogilvie's 'Imperial Dictionary'). It certainly nowhere appears that the defendant ever insinuated that plaintiff had practised any deception

upon the Colonial Medical Council in order to obtain a license to practise in this Colony. The plaintiff has therefore failed upon the first innuendo, namely, that contained in paragraph 4 (*a*). As to whether defendant has made out to the full these allegations in his plea (paragraph 8 *e*) to this portion of the case must depend upon other facts. It seems that shortly after plaintiff's arrival in this Colony he became a partner of Dr. Edwin Atherstone. Before leaving Scotland he had sent his then wife to Grahamstown for the benefit of her health, and some time later he followed her to this Colony. Dr. Atherstone had been attending her in her last illness. It seems to have occurred, either to the plaintiff himself, or Professor Meiklejohn, that he might wish to apply for a district surgeoncy in this Colony. A number of testimonials were printed in pamphlet form, apparently with the assistance, or under the supervision of Professor Meiklejohn. The plaintiff says that he never read the pamphlet, and that the preface, though expressed in the first person singular, was not written by him, and the Solicitor-General has pointed out that it is not signed by anyone. Some considerable number of these pamphlets were printed (almost 200), and plaintiff tells us that he sent one to his wife, who was then at Grahamstown. During the course of his opening speech, the Solicitor-General made a statement as to two others having been given to some one in Capetown, but there is no evidence before the Court upon this point at all. Besides the pamphlet sent to his wife (and also seen by Dr. Atherstone before the arrival of plaintiff in the Colony), two others were seen by Dr. Greathead, in the hands of two of his patients. One of these patients was Albert Lawrance, a wine merchant in this city. The name of the other patient we do not know, as Dr. Greathead did not recollect it when he was in the witness-box. Mr. Albert Lawrance says the copy he received was obtained from a servant of the plaintiff. The plaintiff says he never circulated any of these pamphlets, but says one may have been shewn among the papers he handed to Mr. Richards after his arrival in the Colony. The rest of the pamphlets he tells us he still has at his house. Now, the plaintiff undoubtedly was the cause of this pamphlet coming into existence, and if he chose to be as careless as he says he was, and the

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contents of the pamphlet with "Dr. Saunders, F.R.C.S." printed on the outside of the covering sheet became known to the public either through his sending it to his wife, or permitting some one like Mr. Richards to read it, or leaving copies or a copy carelessly abroad, he can hardly be heard now to complain that a reader of the pamphlet arrived at conclusions which might fairly be deduced from the printed contents of the pamphlet itself. Someone who composed the preface to this pamphlet which the plaintiff says he intended to use in making application for the post of district surgeon, had written in the preface this sentence, "In submitting the following testimonials, I would wish to remark that after *taking my degrees* in Edinburgh and London, I applied for the appointments of Medical Officer of Health to the Parishes of Crail and Kingstown, Public Vaccinator, and Medical Officer to the Coastguards, all of which I was fortunate enough to obtain." Now any man who knew the plaintiff's previous history must have known that he had no University degrees whatever, either from Edinburgh or London. The plaintiff says Professor Meiklejohn wrote this sentence. The professor is not here, but if he did write it *he* must have known either that it was untrue, or he must have been making a statement as to facts of which he knew nothing. The plaintiff, however, must take the responsibility of having made the statements, as it could never have reached the public without his consent; or else through his carelessness, or by his instrumentality, it has got into the hands of the public. One cannot help regretting that this pamphlet was ever printed; it could hardly be expected to produce any beneficial effect to the plaintiff in the long run, upon those who have sufficient knowledge to enable them to estimate the relative value of University degrees or College diplomas, or licenses. Those who are acquainted with the relative merits of such certificates would at once place a correct value upon them. Those who know nothing about the subject might possibly be induced to believe from the sentence I have quoted, that the plaintiff possessed degrees from either the University of Edinburgh, or the University of London, and might be inclined to consider that the plaintiff was possessed of higher University distinctions than in fact he did possess, and of course the higher their

ignorant estimates of the real value of such qualifications, the greater would be their confidence in him as a medical practitioner. However, it is easy to understand that among professional men, and among men who have any feelings of respect for fair and just conduct, any apparent attempt to induce the public or individuals to assume the existence of a degree in a medical man which he did not possess, would meet with resentment and just condemnation, and any fair and *bonâ fide* criticism made by an individual upon the conduct of a professional man, who chose to lead the public astray, or allow the public to be led astray upon a matter of this kind, would be protected. In my opinion the criticism of the defendant upon this portion of the plaintiff's conduct would not have been too severe if he had merely asserted that plaintiff had represented that he had degrees in Edinburgh and London, and the plaintiff would have only had himself to thank for any of the results which would naturally have followed for the course he had adopted. Before allowing the pamphlet to be read by any one, he should at least have taken the trouble to read it himself and make certain that its contents were correct. As it is, the contents of the testimonials have been altered. In many places where the person who wrote the testimonial used the word "Mr." the designation has been changed to "Dr." in the printed testimonials, though on looking at the originals this is certainly not at all a printer's error. Alterations of this kind are quite unjustifiable, and deserve severe criticism. The defendant did not go too far when he stated the plaintiff represented himself to be the possessor of a degree when, in fact, he had not any such degree. The person who made the alteration in the printed testimonials evidently did not wish it to be supposed that the plaintiff was not entitled to be called doctor, but was only of right entitled to be called "Mr." Obviously the alteration was made, because it was deemed more advantageous that he should appear as "Dr." instead of "Mr." F. A. Saunders or Mr. Saunders, as he appears in many of the testimonials. I do not doubt that, strictly speaking, the L.R.C.S., F.R.C.S., and L.R.C.P. of Edinburgh give no right to a medical practitioner to assume the degree of doctor of medicine, though for some reason, which is not quite obvious in common parlance, persons who are medical practitioners

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in this Colony and in most English-speaking countries, often, and in fact generally are addressed as "doctors," style themselves doctors, and even place the title upon their door-plates, cards, and the accounts they send in to their patients. The mere fact that the pamphlet was headed "Dr. Saunders" might have been passed over as a matter of no very serious importance, had various alterations not been made in the testimonials contained in the pamphlet, and the statement made in the preface to the pamphlet. The expression "after taking my degrees in Edinburgh and London," was clearly intended to convey the idea that plaintiff had some sort of degree won in these places. In the circumstances, I can hardly think that the plaintiff can complain of the defendant having pointed out that he was not a doctor of medicine, or having asserted that he said he had a degree when he had not. Upon his arrival in this Colony plaintiff tells us that he became acquainted with Mr. Richards, who (we learn from Mr. Grocott) is a part-proprietor of the *E. P. Herald,* and a contributor to the columns of that journal. The plaintiff says he allowed this gentleman to see his testimonials, and that he may have placed the pamphlet in question before him together with his testimonials. One would naturally suppose that in doing so, it would have occurred to plaintiff that by this means some portion of the contents might at least be made public. I confess that this object which presented itself to the plaintiff's mind has not been satisfactorily explained. I understand him to mean that he had no idea whatever that the testimonials would be used for any purpose whatever, except being inspected by the person to whom they were handed, and for his own private information. If this be so, then Mr. Richards had no justification whatever for penning the paragraph in question, or making extracts from the testimonials handed to him for publication. Mr. Richards himself, however, would appear to have taken a very different view of the situation, as in a communication which appeared in the *Penny Mail,* he boldly asserts (in his letter dated July 12th, 1892), the following: "Dr. Saunders and I have been mutual friends, and when I met him in Grahamstown for the first time a fortnight ago, it occurred to me that a short paragraph, announcing his intention to settle in Grahamstown, would be of service to him. I

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therefore asked him to allow me to see his testimonials and papers, and under my hand the paragraph grew to somewhat extended dimensions." This statement has never been contradicted, and in fact the plaintiff admits that Richards asked for his papers and testimonials, and that he (plaintiff) handed them to him; as plaintiff says, Richards did not tell him why he asked for these papers. The unfortunate part of the matter is that the paragraph in question contains statements which do not appear in the testimonials and letters. For instance, the statement that plaintiff had been in practice in Scotland for eleven years, where he had the largest country practice in the whole of Scotland, and the following: "It was Dr. Saunders who, on one occasion during a serious operation, risked his own life and saved that of his patient by sucking out the tracheotomy tube in a case of diphtheria. Her Majesty on this occasion directed the Duke of Richmond and Gordon to send a letter to Dr. Saunders conveying her appreciation of his courage and devotion in the cause of humanity. For this service Dr. Saunders was recommended by the Lord-Lieutenant of the County of Fife for the Albert Medal." Two letters were put in which shew that as a matter of fact the latter statement is incorrect. It seems that an application was sent in for a grant of the Albert Medal addressed to the Secretary of State, dated 7th October, 1885, by Sir Thomas Erskine of Cambo, Crail, Fifeshire, for the plaintiff's action in connection with a case of tracheotomy, and in reply to it the Secretary, Sir Richard Assheton Cross, directed Mr. S. Stuart Wortley to inform Sir T. Erskine that while he "fully recognised the great bravery shewn by Mr. Saunders, and wished to express his high commendation of his gallant conduct, he regretted that the case was one which he would not feel justified in submitting to the Queen with a view to Her Majesty's award of the decoration in question." In a letter dated the 6th October, 1885, from Mr. C. Dunbar, addressed also to Sir T. Erskine, he writes as follows: "I am directed by the Duke of Richmond and Gordon to transmit to you, herewith, for your perusal a letter which has been received from Mr. R. Barclay Allardice, submitting particulars of an operation of tracheotomy performed in May, 1883, at Crail, in Fifeshire by Mr. F. A. Saunders, and suggesting that the

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Albert Medal should be granted to him, and I am to acquaint you that His Grace cannot but think it somewhat strange that this application should have been delayed for so long, but that he will, nevertheless, be glad if you will be so good as to return the accompanying letter at your earliest convenience with any observations you may wish to make, or any further particulars which are within your knowledge." Now, however valuable the services rendered by the plaintiff may have been in this tracheotomy case, there is no foundation in these letters for the statement that Her Majesty directed the Duke of Richmond and Gordon to "send a letter to Dr. Saunders conveying her appreciation of his courage and devotion in the cause of humanity." In this paragraph there also appeared the statement that the plaintiff had held the position of Demonstrator of Histology in the Physiological Laboratory, University College. As a matter of fact he was merely an assistant-demonstrator, and never held the higher office of Demonstrator. This statement as to his being "late Demonstrator of Histology, University College," also appears on the title-page of the pamphlet already referred to. The defendant suggests that the University College in which plaintiff was assistant-demonstrator should have also been named, and that University College, Liverpool, should have been named in order that people should not think that University College, London, was meant, which is a much higher medical school. He also states that when F.R.C.S. was placed after the words "Dr. Saunders" in the paragraph which appeared, that the word Edinburgh should have appeared also, so that the public might be made aware that it was a diploma of somewhat less value than the F.R.C.S., London, which would be generally (he says) supposed by the public. Perhaps it would have been better that this should have been done, but I do not think that the absence of the words "Liverpool" and "Edinburgh" is a matter which can affect the result in this case. Before the commendatory paragraph appeared in *Grocott's Penny Mail*, it appears from the evidence that Mr. Richards went to the office of the *Penny Mail* and offered his manuscript communication to Mr. Grocott, who pointed out that it was practically an advertisement, and that he intended to charge for it as such, though at the same time

Mr. Grocott appears to have considered that it should have been regarded as a "communication" and not as an advertisement. From the professional point of view, and in consideration of the fact that the plaintiff could not advertise in accordance with the rules of the College to which he belonged, the part taken by Mr. Richards certainly could not be viewed as by any means a friendly one, unless he had previously obtained the plaintiff's consent. If he had obtained the plaintiff's consent to putting in a "puff," as Mr. Mackay calls it, of the kind which appeared, it would have involved the plaintiff in the forfeiture of his licenses from the colleges to which he belonged. If Mr. Richards had not obtained his consent, he was placing the plaintiff in a false position, as upon the very face of the puff it appeared that he (or rather the editorial "we") had been placed in possession of the plaintiff's testimonials, one of which (speaking editorially), "we pick out at random." Now, after this apparently editorial puff had appeared, it appears from the evidence that Dr. Atherstone at once sent to the plaintiff and complained about the notice having appeared, and some days later, on the 10th July, the plaintiff wrote to the *Penny Mail* the following: "It having come to my knowledge that certain maliciously disposed persons are stating that I inserted, or was the cause of inserting the paragraph in your paper of July 6th, I trust that you will insert this my unqualified denial, in your next issue, and oblige yours truly,—Fred. A. Saunders." Simultaneously there appeared a letter from George Impey Richards, taking all the blame of the insertion of the paragraph upon his own shoulders. It must, however, be noted that there was no denial whatever on the part of the plaintiff that the paragraph contained mis-statements as to his qualifications, and consequently as Richards asserted that he had asked plaintiff to shew him his testimonials and papers, and that under his hand the paragraph grew to somewhat extended dimensions, it might still be fairly assumed by readers of the *Penny Mail* that the information in the paragraph was derived from the testimonials, as no denial of the facts stated was received from the plaintiff and published to the public. In fact the public were left to assume the truth of the paragraph, though the authorship by the plaintiff was explicitly denied. The plaintiff has now

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sworn that he knew nothing of the contents of the paragraph or article before it appeared, and that he never heard, until Tuesday last, of its having been paid for as an advertisement. I need only say that upon this portion of the charge made by defendant, the Court is of opinion that the defendant could not be held responsible for mere vehemence of language with reference to the representations as to the plaintiff's qualifications, which was directly or indirectly allowed to go before the public in the pamphlet or in the paragraph in the *Penny Mail*. The defendant's language, however, signifies somewhat more than the words actually used in the pamphlet state. It is true that plaintiff said he had degrees. He nowhere, however, states definitely that he is a "doctor of medicine." He uses the word "Dr." before his name, but this may have been colloquially. The defendant has undertaken to shew that plaintiff falsely stated that he was a doctor of medicine, and has failed to prove up to the hilt the justification he sets up for the words he has used. If the defendant had written no more than this it is obvious that the damages for this technical libel would be exceedingly small. It would have been almost impossible to say how much the falling off of practice was attributable to the fact that the defendant had made the charge with reference to falsely representing he was a doctor of medicine, and how much to the fact that he (defendant) had said what was perfectly true, namely, that the plaintiff had not a degree from any university. The next charge that the defendant has made against the plaintiff is, that "he recently tendered an account of sixteen guineas to a working man, whom he pumped ten times." The working man, it would appear, did not object to having his "inner man" pumped ten times, but he did object to having his pocket pumped to the tune of sixteen guineas. Accordingly, he remonstrated about the financial pumping part of the transaction, and the bill was reduced to one-third the original amount . . .; the medical man knew full well that he could never reclaim in a Court of law sixteen guineas, or the half of it, from the man ten times "pumped." The innuendo founded upon this statement by the plaintiff is that the plaintiff rendered a false and fraudulent account to a certain workman, and had, by means of the fraudulent account, attempted to defraud the

workman of the sum of £11 4*s.* sterling. The defendant contends that he only meant that the charge of sixteen guineas for pumping a working man ten times was an exorbitant charge, and one that could not be recovered in a Court of law, but that he did not imply that this charge of sixteen guineas was £11 4*s.* in excess of a just and recoverable charge. It appears from the evidence that the case of one Pittaway was intended to be referred to by the defendant. Unfortunately for the defendant there appears to have been a somewhat different transaction altogether to that to which he referred. The account rendered included other items, *e.g.*, for a confinement; and attendance to a child of Pittaway's was also included in the account. Moreover the attendances charged for were not those of the plaintiff only, but of Dr. Gillespie. Mr. Heany has explained that the mistake was his in sending in the account for £16 odd shillings, and that it arose through a mistake of his and not of the plaintiff. Undoubtedly there was extreme carelessness on the part of Mr. Heany in making up this account, and glancing at the items as recorded in the ledger kept by him, one cannot help being struck with the fact that there must, at the very least, have been very gross carelessness on his part. As soon, however, as Pittaway complained of the account rendered to him it would seem that the error was admitted, and Dr. Gillespie told him that there must have been a mistake in the account. The error was corrected by Heany when Pittaway went to Wells's shop to settle another account he received from Wells, and the amount was reduced to £5 11*s.* This had occurred some time before the letter of the 8th May was written, and therefore there could be no ground for making the serious charge alleged in the letter of the defendant to *The Journal.* Upon this point the defendant went beyond the limits of fair criticism, and he has made a statement recklessly, and without fairly stating all the facts as they really existed. He undertook the responsibility of making the charge at a time when the error had already been corrected, and he stated the fact erroneously and in such a manner as to impart a fraudulent motive to the plaintiff which the facts proved do not bear out. Upon this portion of the libel alleged, he must be held liable for any injury the plaintiff may have sustained

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in consequence. The next charge of which the plaintiff complains is that contained in the following sentence: "The canons of common sense are not for a moment to be considered when one is fortunate enough to be in the hands of a self-styled doctor, who is in possession of a testimonial written by a man that never lived." Now the plaintiff alleges that these words convey the interpretation that "the plaintiff is in possession of a false and fraudulent testimonial, purporting to be signed by some medical authority, which medical authority never existed, and that he is in the habit of fraudulently using the said testimonial for his own advantage and profit." The defendant contends that the plaintiff has "published, or caused to be published, of and concerning himself, a false and misleading newspaper puff, wherein it was stated that he possessed a testimonial in writing, purporting to be written by a man who never existed." The basis of the fact upon which the defendant's charge is founded is that the puff published in the *Penny Mail* contained the statement that the plaintiff possessed "the highest testimonials from the Professor of Surgery of the University of Edinburgh, Professor Chime." As a matter of fact, it appears from the evidence that the plaintiff did possess a testimonial from the Professor of Surgery of the University of Edinburgh, Professor Chiene. By a misprint, or some printer's or clerical error, Chime seems to have been inserted in the paragraph which appeared in the *Penny Mail*. This would not justify the statement made by the defendant that plaintiff was in possession of a testimonial written by a man who never existed, and, in my opinion, the defendant must be held liable for the libellous assertion, as it necessarily implies that the plaintiff is in possession of a false and fraudulent testimonial, purporting to be signed by some medical authority who never existed. In proof of this, defendant has clearly failed. Had he simply stated that Chiene and not Chime was the Professor of Surgery of the University of Edinburgh, he would have written the truth and incurred no liability. I must now pass on to the charges levied by defendant against plaintiff, contained in the letter which appeared in *The Journal* of the 22nd May. The plaintiff complains of the following words: "I consider the medical profession the most honourable of all professions, and for this reason

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was anxious that its fair escutcheon should not be trailed in the gutter of Grahamstown, by any self-seeking individual who catered to a druggist for commission on his prescriptions, or who indulged in various other unprofessional practices, of which I shall probably have something to say elsewhere on a future occasion." I need not repeat the concluding words, with reference to the plaintiff not being a doctor of medicine, as I have already dealt with this elsewhere in this judgment. I have already pointed out that these words clearly point to the plaintiff. Now it is contended by the plaintiff that these words contain an allegation that plaintiff was a disgrace to the medical profession, and had trailed the honour of the profession in the mud. The defendant denies the innuendo alleged by the plaintiff. For myself, I may say I think that the innuendo is contained in the words written by defendant. Upon this point the defendant has not proved any justification. Passing on to the next accusation, the plaintiff complains that the words mean that he had entered into an unprofessional arrangement with some druggist, under which the plaintiff undertook to send all his prescriptions to the said druggist, to be made up by him, in consideration of the said druggist paying the plaintiff a commission on the drugs dispensed by him under the said prescriptions, to the injury of the plaintiff's patients. The defendant has contended that the plaintiff or his partner, Dr. Edwin Atherstone, did enter into an arrangement with a druggist by which arrangement they received commission on their prescriptions. Now there cannot be any doubt that years ago, when Dr. Atherstone and Dr. Williamson gave up dispensing drugs for their patients, they did get Wells to do the work for them, and make up the prescriptions which they wrote for their patients, instead of making up the prescriptions themselves, and that Wells paid the two doctors some share of the amounts received for the prescriptions made up, whether their prescriptions were original prescriptions or repeats. After Dr. Greathead came to this Colony, this arrangement appears to have been modified, and a smaller commission was paid to the chemist. Whether this arrangement was unprofessional or not the evidence does not shew, though the plaintiff evidently did not quite like the idea of such an arrangement. That it is an unde-

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sirable—I would almost say pernicious—arrangement, I think, must be clear, at least as far as the public are concerned, and the chemists who dispense drugs. When the doctor ceases to perform the duties of dispenser, he should certainly not enact from the chemist a share of the profits which would fall naturally to the chemist for the performance of his professional duties, simply upon the ground that the medical men had recommended the patient to use certain drugs in certain proportions, and had sent him to the chemist to get the necessary prescriptions made up. The patient thinks he has simply paid the medical practitioner a fee for medical advice, but has no notion that he has also been advised to take a particular medicine, for which the prescriber pockets a fee for doing nothing except sending the patient to a particular chemist to obtain his physic. Whichever way the case is put, the doctor gets paid more than he professes to receive from the patient, and the tendency of the arrangement is to make the patient pay through the chemist a commission for which the patient gets nothing whatever. At the same time it tends to deprive other deserving chemists of a fair share of dispensing practice to which they are justly entitled. This was not, however, a system which was introduced by the plaintiff, nor was he the only practitioner who received pecuniary benefits under it. It had been in vogue long before he came to the Colony, and he merely acquiesced in a system which, he says, he did not altogether like. Now, if defendant had limited himself to an attack on this system, and the medical practitioners who reaped advantage from it, the plaintiff had no cause for complaint, but he has not done so. He speaks of the plaintiff as one who "catered to a druggist for commission on his prescriptions," and in his letter of April 14th, addressed to the editor of *The Journal*, as well as by the cross-examination of witnesses in this Court, he has shewn what he meant by the word "catering." He wrote, "when a patient finds his medical adviser pouring into him numerous and ever-varied bottles of physic, the patient may safely consider that he is in the hands of a tout, and if he will exercise his reasoning faculty he will cogitate somewhat thus on the subject: 'Either my medical man does not understand what is the matter with me, and is guessing at my complaint, as witness the

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constant change of physic, or, knowing my complaint, he is catering to a druggist at the expense of my pocket, *by swilling me with unnecessary drugs.*'" Now, this *swilling with unnecessary drugs* is what the defendant has tried to prove the plaintiff was actually guilty of. He has by his plea undertaken the responsibility of proving this charge, and he has failed to shew it. He has merely shewn that Mr. Abbott, the chemist, made up 803 original prescriptions written by Dr. Saunders in about two years—a little more than one a day—a number which Dr. Atherstone says bears but a small proportion to the total number he would actually prescribe in a day. It has also been shewn by Mr. Heany's evidence that between the 8th May, 1893, and 8th May, 1894, Wells made up about 1800 prescriptions for Dr. Saunders. As far as the number of prescriptions actually made up goes, there is nothing to support the *gravamen* of the charge made by defendant. He went a little further, and attempted to shew that, as a rule, in the plaintiff's prescriptions there was too much water, and that he generally prescribed a 14-oz. bottle, and ordered 1-oz. doses, when he might have prescribed the same mixture in a smaller bottle and given smaller doses, allowing the patient to add the necessary water. It is shewn that the plaintiff does prescribe at times 14-oz. bottles, but there is no evidence to prove that this form of prescription was such as to indicate that the plaintiff had been guilty of swilling his patients with unnecessary drugs. With reference to this portion of the defendant's letter, he has gone beyond the limit of fair *bonâ fide* criticism. As to the charge that plaintiff "indulged in other unprofessional practices of which" defendant wrote that he would "probably have something to say on a future occasion," the defendant in his plea denied the innuendo placed upon the statement in the plaintiff's declaration, but did not set out any facts justifying the truth of the general charge. In cross-examination he suggested more than one question which was intended to convey the idea that the plaintiff had been guilty of *mala praxis* of various kinds; but upon this part of the case he must fail. The innuendo placed upon the words complained of is clearly correct. As to the question of how much in a case of this kind the plaintiff should be awarded as damages for the defamation he has sustained, I have already pointed

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out that very little can be awarded for the statement that he falsely represented himself as a doctor of medicine; but for the rest we must consider what his position was when he started in practice here, and the character of the practice he had when the alleged libels were published. Under ordinary circumstances a medical man starting a practice has somewhat uphill work. His real qualifications are not known, his degrees and diplomas he cannot advertise, but the *Government Gazette* simply states the qualification which he actually possesses and registers—the *Government Gazette* which is rarely, if ever, read by those who are likely to be patients of the medical man who commences practice. A paragraph appearing in a widely circulating newspaper with the guarantee of the editorial "we" produces upon the minds of the inhabitants generally of a small district effects which no advertisement in the ordinary forms adopted by trade can produce. Even if a denial of the authorship of the paragraph immediately appears, signed by the man in whose praise the paragraph was written, the effect of the statement in the paragraph would still remain, and unless the facts in it were contradicted, the facts stated, especially if they were alleged to be the result of a scrutiny of testimonials then lying before the unknown editorial "we," would be assumed by the public to be actually true. A string of qualifications, offices, fellowships, etc., would produce a considerable effect upon the minds of those wholly unacquainted with their intrinsic value, and a sudden rush to the unduly belauded medical man would not be an improbable consequence. We have been told that the practice of Dr. Atherstone after the plaintiff joined him was at once increased to the extent of twice the amount of that which it was before the plaintiff became his partner, and that when the letters of the defendant appeared, it immediately fell, at least by a quarter according to Dr. Atherstone, and a half according to the evidence of the plaintiff. Now it cannot be doubted that the attack upon the plaintiff's supposed qualifications would naturally produce some portion of the loss of practice which plaintiff has sustained; but it must be, I think, obvious that one ground for the sudden increase of the practice which had been previously enjoyed by Dr. Atherstone, was the belief, which would naturally be produced by the paragraph in *Grocott's Penny Mail*, that

plaintiff possessed superior qualifications to any local practitioners who had hitherto enjoyed the confidence of patients in this district. There was a remarkably sudden increase of practice, and as remarkable a fall after the letters appeared.

We have heard that there were a few deaths after certain operations performed by the plaintiff. Even though no blame were attachable to the plaintiff, some effect to the detriment of the plaintiff's practice would naturally follow these mishaps, for the evidence, as far as it goes, does not shew they were anything more than mishaps. Again, the very fact that accounts of somewhat large amounts had been sent to patients, had been objected to, and subsequently reduced, would tend to a reduction of the previous practice enjoyed by the plaintiff, even though the charges had been precisely in accordance with the usual medical tariff, and the account had been perfectly fair and just. A few mistakes in accounts like those which Heany says he made in Pittaway's case, would be undoubtedly injurious to the practice of any professional man. Even a statement, especially if perfectly true, that the doctor who prescribed enjoyed some species of percentage upon the prescriptions he wrote for his patients, might produce some disinclination to consult as to the precise drugs to be employed for the cure of the patient, and a consequent reduction of practice would be no improbable result. All these matters must be taken into consideration in estimating the amount of actual damage the plaintiff has sustained from those portions of the letters of the defendant which went beyond fair criticism of the conduct of the plaintiff, as a man practising his profession publicly in these districts. Had it been known that his diplomas were no better than those possessed by the local practitioners, he could hardly have jumped into a practice of twice the value of one of our leading local practitioners, Dr. E. Atherstone. He can hardly, therefore, claim that he is entitled to the full amount of loss which he says followed from the publication of the letters of defendant. The worst attack upon the plaintiff was that which was made upon his medical qualifications, and this attack has been better supported than any other portion of the defendant's case.

After careful consideration the Court thinks that the sum of £50 will compensate the plaintiff for any loss he may

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have sustained from those portions of defendant's letters which have exceeded fair and just criticism, and which have been actuated by malice. This judgment will carry costs.

NDINDI *vs.* MABUYA.

Interpleader—Evidence.

It is not necessary for plaintiff in an interpleader suit to prove that a legal attachment was actually made; unless some special defence is raised, he has merely to shew that the property purporting to have been attached is his.

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Ndindi *vs.* Mabuya.

Appeal from a decision of the Resident Magistrate of Stutterheim.

It appeared that on the 5th day of July, 1894, Mabuya obtained judgment against one Jada, and that on the 12th day of July certain cattle were seized at Jada's residence under a writ of execution issued to satisfy this judgment and costs. The appellant Ndindi (plaintiff in Court below) claimed that a cow and a calf, included in the cattle seized, were his, and had been merely left to graze on the property of Jada, who was his step-father, and took out an interpleader summons in the Magistrate's Court to recover them. At the hearing of the case Ndindi swore that two of the cattle seized were his, and both plaintiff and defendant restricted their evidence to the question of ownership. The messenger was not called to prove the attachment, and it did not even appear that the writ of execution with its return had been put in.

The Magistrate dismissed the summons with costs, on the ground that no formal proof of the attachment was given. In his reasons, which were very voluminous, he pointed out the various embarrassments that might result from the absence of this formal proof; it might transpire that there never had been an attachment, or that some quite different property had been seized under it, or that the circumstances were in some other respect such as to prevent the plaintiff succeeding.

From this decision the present appeal was taken.

Hutton, for appellant (plaintiff below).

The very issue of an interpleader summons implies that an attachment has taken place; this is shewn by form of summons (sect. 58, Sched. B, Act 20 of 1856); see also remarks of Barry, J.P., in *Cholwick* vs. *Penny* (5 E. D. C. 276). Only question raised was that of ownership, and the cattle were clearly shewn to belong to the appellant.

There was no appearance for the respondent.

JONES, J.

In this case the Magistrate has displayed great diligence in giving the reasons for his decision, but he seems to have forgotten what the evidence before him really was. It is plain that all he had before him was the claim of Ndindi to the ownership of the property seized in satisfaction of the judgment of July 5th, and all he had to decide was to whom this property really belonged. If any of the defences, which he suggests as possible, had been set up, this should have been done in the evidence led by the defendant. As no such defence was raised he had merely to decide the question of ownership. The appeal must be allowed; and the case will be sent back to the Magistrate to decide who is the owner of the cow and the calf claimed by Ndindi. Costs here and in the Court below to abide his decision.

SEARLE, J., concurred.

QUEEN *vs.* WALLACE.

Magistrate's Court Act—Appeal—Remitted Cases under Act 43 of 1885.

Where a Magistrate has sentenced a prisoner to a term of imprisonment, acting on the view that he had not the power to inflict a fine instead, an appeal or review will not be allowed on the ground that this view was erroneous, and that consequently the Magistrate never exercised a judicial discretion.

Whether a Magistrate, trying a statutory offence, for which imprisonment is the only penalty provided in the statute, has power to inflict a fine instead, owing to the case being

remitted under s. 1, *Act* 43 *of* 1885, *which gives a Magistrate in "any crime or offence" so remitted power to inflict a fine up to a certain amount or imprisonment to a certain extent,* not decided.

1894. Aug. 21. — Queen *vs.* Wallace.

Review of a decision of the Acting Resident Magistrate of Albany. C. W. Wallace was indicted under sect. 71, Insolvency Ord. of 1843 for the crime of culpable insolvency in that he had not kept or caused to be kept such reasonable and proper books or accounts containing all such entries belonging to, and exhibiting the nature of, his dealings and transactions, as (regard being had to his trade of butcher) might reasonably be expected and required. The penalty provided by the ordinance is imprisonment, with or without hard labour, for any period not exceeding six months. The case was remitted to the Magistrate under sect. 1, Act 43 of 1885, and the prisoner pleaded guilty. In the Court below circumstances were urged in mitigation of punishment, and it was argued for prisoner that the Magistrate had power in all cases remitted under Act 43 of 1885 to punish either by fine or imprisonment. The Assistant-Magistrate, however, came to the conclusion that he had no such option, and sentenced the prisoner to three months' imprisonment with hard labour.

The case was now set down for argument on review.

Sampson (for prisoner) was proceeding to argue that the wording of sect. 1, Act 43 of 1885 gave a Magistrate power to either fine or imprison in any case remitted to him.

[*Per* JONES, J.: On what ground of review are you proceeding? If the punishment inflicted was within the Magistrate's jurisdiction we cannot go into the question whether his reasons for arriving at it were correct or not. It is from a Magistrate's decision, not from his reasons for it, that an appeal lies. Are you not really trying to reverse or alter a sentence on the ground that it is unnecessarily severe, contrary to the proviso (sect. 49, Act 20 of 1856)?]

The ground of review is that the Magistrate did not exercise his judgment judicially, as he was influenced by his opinion that he had no option.

[*Per* JONES, J.: What order could we make that would not be nugatory? If we sent this case back to the Magis-

trate he might inflict the same penalty without giving any reason for it].

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That would at least give us an opportunity of setting before him reasons why a fine would be a sufficient penalty.

Maasdorp (S.G.), for Crown was not called upon.

Per JONES, J.: In this case it is unnecessary to add anything to what I have already said. If any irregularity or illegality were set up the Court would review the case, but none such is alleged. The only fact adduced is that the Magistrate did not think he possessed the option of inflicting a fine. If what is by law an offence is sufficiently charged and proved and the sentence inflicted is within the Magistrate's jurisdiction to impose, the Court cannot interfere with this sentence merely because the Magistrate held a certain opinion, about the correctness of which we need not at present come to any decision. Of course if on reading the records we come to the conclusion that the punishment imposed is unnecessarily severe we have the power of making a representation to the Crown. The appeal must be dismissed.

SEARLE, J., concurred.

DU TOIT *vs.* JONES.

Insolvency—Insolvent Trustees—Judgment de bonis propriis.

Where an action is brought in the Magistrate's Court against a Trustee in Insolvency, and the summons does not ask that he should be ordered to satisfy it out of his private estate, though the Magistrate may possibly be justified in making an order to this effect proprio motu, *his reasons for so doing must be founded on facts clearly appearing on the record.*

1894. Aug. 25 Du Toit vs. Jones.

Appeal from a decision of the Resident Magistrate of Herschel at a periodical Court held at Lady Grey. The appellant (defendant in Court below) had been summoned in his capacity of trustee of the insolvent estate of John Vicars to answer the respondent in an action to recover £10 witness's expenses which the respondent had incurred in attending a trial at Aliwal North, at the special instance and request of appellant. It appeared that in April last

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Du Toit vs. Jones.

Du Toit, as trustee in the estate of John Vicars, had taken an action against the Divisional Council of Aliwal North. He personally served Jones with a subpœna to attend as a witness at Aliwal North, but Jones returned the subpœna, stating that one of his children was dangerously ill, and that he might be prevented from attending. Du Toit took back the subpœna, but urged Jones to attend if he possibly could; Jones did attend the trial, and there was evidence that he was a necessary witness and was regarded as such by Du Toit. The case against the Divisional Council was dismissed on exception, and Du Toit subsequently refused to pay Jones's witness's expenses. The action now under appeal was taken to enforce payment of them. The Magistrate gave judgment for the plaintiff for £8 with costs; if this sum was not paid within one month the defendant to satisfy it out of his private estate, against which execution was to issue. Against this latter portion of the judgment the defendant now appealed. There was no claim in the summons for payment out of defendant's private estate. The Magistrate in his reasons stated that plaintiff's attorney said at the commencement of the proceedings that he meant to apply for judgment against the defendant personally; that it appeared to him that the trusteeship of Vicars' estate had been taken up as a speculation; and that there was a want of *bona fides* in the defendant's treatment of his witnesses.

Sampson (for appellant). The Magistrate's reasons were not based on anything given in evidence. Respondent should have protected himself by refusing to attend trial till his expenses were tendered.

Maasdorp (S.G.) (for respondent).

Appellant was personally liable for amount of judgment; he had got no authority from the creditors to bring the action against the Divisional Council, and though this was not actually necessary, in its absence he acted at his own risk, and judgment could be given against him personally (*Meybergh* vs. *Commissioner for the Sequestrator*, 1 Menz. 345; *Kotze* vs. *Kotze's Trustees*, 2 Menz., 436).

[*Per Curiam:* Is it not usually stated in the application that judgment is asked against the trustee personally, so that the question can be properly raised?]

There are instances in the case of guardians and executors where the Court has made this order *proprio motu;* a magistrate can exercise the same power.

JONES, J.: In this case the Magistrate has given judgment for plaintiff for £8 and costs, with the addition that if this sum be not paid within one month the defendant is to satisfy it out of his private estate. The plaintiff sued defendant for witness's expenses simply in his capacity as trustee in the insolvent estate of John Vicars, and there was no notice given of his intention to apply for judgment against him in his individual capacity. Further the Magistrate's reasons for so giving judgment are founded on facts which do not appear in evidence. As there is nothing on the record to shew that he was justified in giving judgment against the trustee individually the appeal must be allowed, and that portion of the judgment struck out; the appellant will be allowed his costs on appeal.

SEARLE, J., concurred.

Re COOPER.

Lunacy Act—Discharge of Lunatic.

In order to obtain the discharge of a lunatic from an asylum the proper course is to apply to the Colonial Secretary as provided by the General Regulations published under s. 71 *of the Lunacy Act. The Court nevertheless retains its power to order such a discharge and will do so, in exceptional cases, even when no application has been previously made to the Colonial Secretary.*

Petition of Elinor Wyse and Frederick Taylor praying for the discharge of Henry Cooper from the Fort England Lunatic Asylum. The petition stated that Henry Cooper was sixty-four years of age, and some eighteen months before had been committed to the asylum in consequence of insanity produced by intemperance. That he was now much improved, and was in no way dangerous to himself or others; that money had to be spent on his support in

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the asylum which otherwise would be available for the maintenance of his minor children; and that petitioners, who were friends and connections of his, were willing to undertake the care of the lunatic if released.

Dr. Adams, Assistant Medical Superintendent at Fort England, gave evidence that Cooper, though not capable of managing his own affairs, was not a dangerous lunatic, and did not require asylum treatment. The usual mode of obtaining the discharge of a lunatic was by application to the Colonial Secretary; if such an application were now made an order for discharge would arrive probably in three weeks or a month.

Burke (for petitioners) referred to s. 35, Act 35 of 1891, which provides that on application for an enquiry into the cause and grounds of any person's detention as a lunatic the Court may make such order as may be deemed fitting.

Maasdorp (S.G.) (for Crown). S. 71, Act 35 of 1891, empowers the governor to make regulations for the discharge of lunatics on the application of relatives or friends, or on probation. These regulations, as published in the *Government Gazette* of March 16, 1892, provide that application may be made to the Colonial Secretary, who may thereupon authorise such discharge. If the present application is granted, it will afford a precedent for the more expensive procedure of applying to the Court.

JONES, J.: There is no doubt that, except in special circumstances, the procedure laid down by the Act for obtaining the discharge of a lunatic ought to be followed. Under the circumstance, however, which we have in evidence that it may take three weeks or a month to obtain a discharge by that method, we will now order that Henry Cooper be released from detention in the Fort England Asylum; the original order declaring him to be incapable of managing his own property to remain in force, and Frederick Taylor to be appointed curator of his person.

SEARLE, J., concurred.

East London Municipality *vs.* Murray.

Negligence—Independent Contractor—Liability of Employer—Municipality—Street.

When a Municipality contract for the execution of a work which necessarily involves danger, it is their duty to contract that the work shall be done in such a manner and under such conditions as to protect the public against the dangers necessarily involved; and failure so to contract makes the Municipality liable for damage caused by the absence of such precautions, even if the work be entrusted to a contractor under conditions which make him an independent contractor.

When a Municipality contracts for the repair of a street, and it is obvious from the nature of the work that they must have had in view the probability of excavations being made in the public street, and the contract does not bind the contractor to fence these excavations or light them up at night, and does not empower him to close the street, the duties of fencing and lighting remain in the Municipality and they are liable for damage caused by the absence of these.

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Appeal from a decision of the Resident Magistrate of East London.

The appellants (defendants in Court below) had been summoned to shew cause why they had not paid to Walter P. Murray (the respondent) the sum of £20 damages suffered by him in that on the 9th October, 1893, whilst walking along the Southernwood Road, known as the St. Peter's Road, within the Municipality of East London, he fell into a hole which had been dug on the edge of the said road by the defendants' employés under the supervision of the defendants' clerk of works, which said hole was wrongfully and negligently left wholly unprotected. The defendants pleaded:—1. That the wrong party had been sued; the work of constructing St. Peter's Road having been entrusted by the defendants to one Charles Ford, an independent contractor, who had the immediate control over the workmen engaged in the work, that he is the person to be sued and not the mayor, councillor, and townsmen of

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East London. 2. General issue. From the evidence it appeared that in August, 1893, the East London Municipality entered into a contract with Charles Ford for the performance of certain work described in the specification as "the reconstruction of St. Peter's Road." The contract set forth:—

Now it is hereby agreed that the said Charles Ford will at his own cost execute the whole of the work of every kind required for carrying out the work shewn and described in the plans and specifications in the best and most workmanlike manner, and to the entire satisfaction of the municipal clerk of works or other person appointed by the council, and that he will accept the decision of the said clerk of works or other person as aforesaid in all points connected with the performance of the works and the quality of the material used therein as final and conclusive . . . . payment to be made upon written certificates during the progress of the work made by the clerk of the works or other person as aforesaid;

and contained *inter alia*

1. This contract is to include all and every kind of labour and materials whatsoever which may be required for and in the construction of the several works to be performed. . . .

5. The contractor is to remove at his own cost any material or rubbish which may result from the execution of the work within such period, and removed to such place as shall be directed by the clerk of works.

6. If it shall appear to the clerk of works that any work has been executed with unsound or imperfect materials, or unskilful or imperfect workmanship, the contractor shall rectify and reform or reconstruct the same in whole or in part as the case may require at his own proper cost and charge; and in the event of his refusing so to do, or to take back any materials or articles which may be considered by the said clerk of works to be unsound, of bad quality, or not agreeable to the terms of this contract, and to provide immediately suitable material in lieu thereof; then the mayor and council shall be at liberty forthwith to employ other tradesmen to perform the work, and to cause the material to be purchased. . . .

7. The mayor and councillors, or any person deputed by them, shall at all times be allowed to inspect the work in progress.

10. The contractor shall not continue to employ upon the work any artificers or labourers who may be found inefficient or inattentive, or who shall act improperly; and in case the contractors shall refuse to dismiss such objectionable persons, the mayor shall be at liberty to stop the work.

11. . . . The contractor is responsible for all damage to persons or property arising out of this contract, and in the event of accident to persons, horses, cattle, sheep, or stock of any sort from insufficient protection, the contractor shall indemnify the council from all claims on account thereof.

On the 9th October, 1893, the work in accordance with

the above contract was in operation and had not yet been handed over to the Municipality. On that date Mr. Walter Murray and a party of friends set out, on a very dark night, to drive to the Regatta ball. When they reached St. Peter's Road they found the road so bad that they left their vehicle and walked quietly along the side path of the road. Mr. Murray was in advance and suddenly fell down a bank into an excavation about two and half feet deep, thereby spraining his ankle. He was walking at the time in the middle of the side path, and the excavation went right across the side path. It was not fenced in and there were no lights near the spot.

The clerk of works to the Municipality deposed that he had, in accordance with the contract, exercised a control over the contractor, but not over the workmen; his control amounting to seeing that the work was properly executed. He gave no instructions to dig the hole nor was it a necessary part of the work; if there was any such hole it would be made by the contractor in the natural course of things to get material. He considered it the duty of the contractor to place a light near the excavation, and knew that a Municipal regulation provided that there should be a light at any such dangerous obstruction. The contractor had told him that a light was placed there and he had accepted his statement without personally seeing to it.

The Magistrate held that the Municipality were liable, that they had been guilty of negligence, and that there was no contributory negligence on the part of the plaintiff, and gave judgment for the plaintiff for the full amount claimed.

From this decision the defendants now appealed.

Maasdorp (S.G.), for appellants: The only ground on which we appeal is the question of the liability of the defendants. The Municipality employed an independent contractor to carry out this work and gave him entire control of the work, and so are not liable for his negligence; the contract provides that the contractor "shall at his own cost execute the whole of the work of every kind"; the Municipality clerk of works was merely appointed as an architect to supervise the quality of the work and had no control over the mode of execution or the individual workmen.

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This is the test of an independent contractor "whether the defendant retained the power of controlling the work" (Wharton on Negligence, s. 181, *Murray* vs. *Currie*, L. R. 6 C. P. 24; *Murphy* vs. *Caralli*, 3 H. & C. 462; *Butler* vs. *Hunter*, 7 H. & N. 826); so Campbell on Negligence s. 108, "The maxim *respondeat superior* does not apply to the case of an independent contractor to whom the execution of a work has been committed by an employer without any control or power of direction being reserved on the part of the employer as to the manner of executing the work." The facts in this case are precisely similar to those proved in *Taylor* vs. *Greenhalgh* (L. R. 9 Q. B. 487), where the employer was held not liable; and in *Pendlebury* v. *Greenhalgh*, (1 Q. B. D. 36), a case arising out of the same accident, though the employer was held liable, the law as laid down in *Taylor* vs. *Greenhalgh* was approved of, but a different view was taken of the facts; as of the "four constituent parts of the contract, material, labour, superintendence, and lighting, and fencing," the labour alone was contracted for, while the material and superintendence were supplied by Greenhalgh or the vestry whom he represented, and no mention being made in the contract of lighting or fencing, the employer was considered bound to supply these; in the present case the whole work was handed over to the contractor.

It has been decided that liability is not imposed on a principal who employs a contractor by the fact that he employs a clerk to supervise the work, he not interfering in the construction, nor because he holds the right to suspend or re-organise the work, nor because he reserves the right of dismissing the contractor or that of refusing to pay unless satisfied. The evidence here shews the clerk of the works never interfered with the details of the work. The excavation too was merely work incidental to the contract, it was not the work contracted for (Wharton on Negligence, s. 182; *Brown* vs. *Cotton Co.*, 3 H. & C. 511; *Reedie* vs. *N. W. Ry. Co.*, 4 Ex. 244; *Pearson* vs. *Cox*, L. R. 2 C. P. D. 269; *Welfare* vs. *Brighton Ry. Co.*, L. R. 4 Q. B. 693; *Rapson* vs. *Cubitt*, 9 M. & W. 710; *Quarman* vs. *Burnett*, 6 M. & W. 699; *Hole* vs. *Sittingbourne and Sheerness Ry. Co.*, 6 H. & N. 488; *Overton* vs. *Freeman*, 11 C. B. 867; *Knight* vs. *Fox*, 5 Ex. 721).

Sampson (for respondents): In ascertaining liability

much depends on the duty which the defendant owes to the person injured. Here the defendants are a public body with the general care of the streets, and it is in evidence that they have a regulation providing that dangerous obstructions must be lighted up; they cannot contract themselves out of this obligation. There is one important exception to the non-liability of an employer for the negligence of his independent contractor: "A man who orders work to be executed, from which in the natural course of things injurious consequences must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of this responsibility by employing someone else, whether the contractor employed to execute the work, or an independent person." Cockburn, C.J. (delivering judgment of the Court) in *Bower* vs. *Peate* (L. R. 1 Q. B. D. 326); *Pickard* vs. *Smith* (10 C. B. (N.S.) 420); *Gray* vs. *Pullen* (34 L. J. (Q.B.) 265).

[*Per* JONES, J.: In all these cases was not the work contracted for necessarily dangerous? Here there is no contract to make this excavation.]

Lloyd states the hole would be made by a contractor in natural course of events to obtain material. The Municipality at all events must be taken to have known that there were works going on which required lighting; in *Pendlebury* vs. *Greenhalgh* (*supra*), Lord Cairns enumerates lighting as one ingredient of works of this kind, and a duty is cast on defendants of providing for it.

Besides the specific act of negligence in causing this excavation and leaving it unlighted and unfenced, the Municipality were guilty of negligence in leaving this road, in its then state, open to the public at all. By throwing it open to the public as a thoroughfare they placed themselves under an obligation to take reasonable care to see that those using it were not exposed to undue danger. (*Clair* vs. *Port Elizabeth Harbour Board*, 5 E. D. C. 312; *Voet*, 9, 3, 5; *Corby* vs. *Hill*, 4 C. B. (N.S.) 551; *Cathcart Divisional Council* vs. *Hart*, 9 Juta, 80.)

Posteà (Sept. 3).

JONES, J.: The appellants in this case were sued in the

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Court of the Resident Magistrate of East London for £20 damages sustained by Mr. Walter P. Murray, owing to his having fallen into a hole which had been dug at the edge of a side path in St. Peter's Road, East London, and wrongfully and negligently left unprotected by the defendants' employés, who, it is alleged, performed the work under the supervision of a clerk of works, in the employ of the defendants. The defendants below pleaded that the wrong party had been sued, as they had entrusted the work of constructing St. Peter's Road to one Charles Ford, an independent contractor, who had the immediate control over the workmen engaged in the work, and that he should have been sued and not the mayor, councillors, etc., of East London. It is upon this plea that the appeal is now made to the Court, as the R.M. found that the defendants were liable, and gave judgment against them for £20 with cost of suit. Now, as far as the facts are concerned, there does not appear to be any difficulty arising from the main fact that a hole was actually dug at a point in the side path of St. Peter's Road. In fact, according to the plan put in, it would appear to have been dug at a point where another street crosses the side path into St. Peter's Road. No lights were placed to intimate to any one travelling along the side path that there was any reason to anticipate danger, and the road and side path were left open for traffic without any fence or other protection being erected. Any one passing along the side path in the dark was liable to fall into the hole and sustain damage. That there was gross neglect on the part of some one is perfectly clear, and it is also in my opinion clear that this negligence was the immediate cause of the injury sustained by plaintiff. The only question is whether defendants can in this case escape from their liability. Primarily the duty of repairing streets properly and without danger to the public is cast upon the Mayor and Town Council. If they repair, they must do it without causing damage to the public. The defendants, however, wish to escape liability upon the ground that they were not guilty of negligence nor were their servants; but that the negligence, if any, was that of one who in no case could, they say, be looked upon as their servant or agent. If these persons were the agents or servants of the Town Council it is clear that the defendants would be liable upon

the principle stated by Lord Cranworth (*The Bartonshill Coal Co.* vs. *Reid*, 3 Macq. 266, 283), that the master is bound to guarantee against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business. Or to put it in the form stated by Pollock on Torts, p. 68: "I am answerable for the wrongs of my servant or agent, not because he is authorised by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others." A further question at once arises, whether the employé is to be looked upon as a servant in the sense in which the term is used here. If he were simply an independent contractor, over whom the employer exercised no control during the performance of the work, he would certainly not be a servant in the ordinary sense. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct the means also, or as it has been put, "retains the power of controlling the work," and he who does work on these terms is in law a servant for whose acts, neglects, and defaults the master is liable. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand" (Pollock on Torts, p. 69). "He who controls the work is answerable for the workman; the remoter employer is not answerable" (Pollock, 70). See for latter proposition *Hilliard* vs. *Richardson*, cited in Thompson on Negligence, Vol. II. 868. "It is only on the ground of a contractor not being a servant," says Crompton, J. (*Sadler* vs. *Henloch*, 4 E. & B. 570), "that I can understand the authorities." In the American Courts it would be seen from Thompson on Negligence, p. 739, Vol. II., that a Municipal Corporation is not "liable for the negligence of an independent contractor or his employés under the acts which caused the injury done in pursuance of the contract itself, or otherwise under the direction of the city, or unless the act contracted to be done was intentionally dangerous—such as blasting rocks—*i.e.*, unless the city through its officials reserved a general control in respect of the mode and

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manner of doing the work. But a mere reservation of power to direct changes in the work—or the taking a bond of indemnity will not have the effect." And elsewhere he says, "In every case, the decisive question is: Had the defendant the right to control in the given particulars the conduct of the person doing the wrong? On this question the contract under which the work has been done must speak conclusively in every case, reference being had, of course, to surrounding circumstances (Vol. II., p. 909). The fact that the employé was hired, not for a definite time, but to perform a particular job, does not, however, negative the relation of Master and Servant, for under such a contract the master may retain full control over him; and it must constantly be borne in mind that this power to control, on the part of the employer is the essential fact establishing the relation" (912). And as an illustration of the kind of control which would render a Corporation liable, he gives the case where it was stipulated that the work was to be done under the direction of the City Civil Engineer, or agent appointed by the City Council for the same, who should have entire control over the manner of doing and shaping all or any part of the same, and whose directions should be strictly obeyed. "Under this contract the city was held liable for the negligence of the contractor in depositing a pile of stones so as to obstruct the flow of surface water and flood the premises of an adjacent owner, partly on the principle of *respondeat superior*, and partly on the ground that the city owed a further duty to prevent or remove nuisances in its streets" (916). (Cases on p. 913 of Thompson on Negligence cited.) Under the contract before us the work was to be carried out to the entire satisfaction of the Municipal clerk of works, and the contractor was to accept his decision in all points connected with the performance of the work and the quality of the materials. The payment was to be at the rate of £24 for every chain of roadway constructed, and 7*s.* for every yard of stone crossing. The Council reserved to itself the right of deviating from the contract. Among other things, the contract shews that the Council had in view the fact that excavations would be necessary. The clerk of the works had the power, no doubt, to superintend the works, and did in fact super-

intend them; and the contractor undertook to hold the Council harmless in case of injury to the public. But, as portion of the work, excavations were to be made in a public street. The contract states that the contractor was "to mark out the road where cuttings are directed to be made, the turf to be cut and stripped in as great lengths as possible, the soil from the cuttings to be used on that portion of the road requiring filling up, and when filled up well rammed, where the roads are sunk below the present surface the ground is to be excavated to a depth requisite for receiving the thickness of the materials required for the foundation of the roads, but where they are to be raised to a height exceeding the actual thickness of the road materials, their difference is to consist of surplus earth taken from the cuttings, properly laid on and made solid to the range of the formation level. In other situations where the line of the intended finished or perfect surface is not so much above the existing or present surface as the intended thickness of the road material, the difference is to be excavated as much as necessary to make room for the materials in order that the finished surface shall be everywhere in accordance with the ranging inclinations, and in compliance with the sectional lines of formation as shewn by the sectional plans. The side pathways will then be cleared of all grass to a sufficient depth which will remove all roots. The pathway will then be levelled off, or filled up, and well rammed, and finished with not less than four inches ironstone gravel in accordance with sectional drawings, the pathway then to be well watered and rolled solid." In the case before us, Mary Murray says there "was a pile of loose stones opposite the bank, the bank was across the footpath, not on the edge of it." The road was obviously in a very dangerous condition, and a few days after the accident the road was closed. No lights were at the spot where the accident occurred, though the Town Clerk supervised the work, and St. Peter's Road was a recognised street, within the limits of the Municipality (see evidence of the Town Clerk). Mr. William Lloyd, clerk of the works to the Town Council, says in his evidence that he had no control over the workmen, but that he had over the contractor, and that his control only amounted to seeing that his

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contract was carried out. He adds the hole or bank at the spot in question would have been made by the contractor in the natural course of things to get material, but he did not instruct him to make such hole or bank. Later on however he says it was not necessary to dig out 2 feet 6 inches deep. In cross-examination he admits this road was in a dangerous condition, and says it could not be otherwise. If this be so, if the work necessarily involved danger, then it surely was the duty of the Council to contract that the work should be done in such a manner and under such conditions as to protect the public against the dangers necessarily involved in the reconstruction of this municipal road. It would have been their duty to have provided under their contract that lights should be placed in such a manner as to protect the public, or else to have closed the road for traffic if no other course was open to them. The clerk of works admits that there were no lights at the spot in question on the night of the accident, and though he says that the contractor told him he was putting lights there, it does not appear that anything was done by the Council itself to avoid the danger, nor do they by their contract compel the contractor to place a light at the dangerous portions of the road, or protect the public from danger by the erection of barriers. Now it seems to me that even if the amount of control retained by the Municipal Council in their contract was insufficient to place the contractor in the position of a servant, within the meaning of that term as used in the cases cited at the bar, the case of *Pendlebury* vs. *Samuel Greenhalgh* is a very strong one against the appellants.—(Judgment by Lord Cairns and headnote read), Ibid. L. R. 1 Q. B. D. pp. 36 and 40.

The Court is therefore of opinion that this appeal should be dismissed with costs.

SEARLE, J.: The appellants, representing the Town Council of East London, were sued in the Magistrate's Court for the sum of £20 for damages alleged to have been sustained by the plaintiff through an injury to his ankle caused by falling into an excavation in St. Peter's Road, East London, which road was at the time, it was alleged through the defendants' negligence, in a defective condition. Judgment was given in plaintiff's favour for the amount claimed. The evidence given for the plaintiff, and

which the Magistrate believed, was to the effect that on the night of October 9th last year he, with others, was driving along this road, when they were compelled to leave their cab on account of the bad state of the road, and to proceed on foot. This road was the usual and regular means of access to their destination, and the evidence shews that it was a recognised street within the limits of the Municipality, and that at the date in question it was being reconstructed by order of the defendants. Whilst proceeding along the side-walk, after having alighted from the cab, the plaintiff, who was in front of his companions, fell over a bank which had been made across the side-walk in the course of the operations for reconstructing the road, into a hole beyond about 2 ft. 6 in. deep. There is little or no evidence to shew how the bank and the excavation beyond it came to have been made; plaintiff's sister says that on the morning of the previous day when she was at the spot the bank may have been there, but was not so noticeable; whilst the defendants' clerk of the works states that before the day in question it was there, but had been partly removed. Plaintiff was seriously injured by the fall, and laid up for some weeks, and it is not now contended on behalf of the appellants, either that there was any contributory negligence on his part (a point upon which the Magistrate has expressly found in his favour), or that the damages awarded were excessive. But it was pleaded in the Court below, and is now urged upon appeal, that there was no liability upon the defendants, because they had given out the contract for the reconstruction of this road to a contractor, Ford by name, and that he was the proper party to be sued. The contract was put in, and also the conditions and specifications annexed to it. Tenders had been publicly called for the work; and the lowest tenderer was Ford, who, it was stated, contracted at a tariff which would entitle him to a sum of about £2,000 upon completion. The work was therefore an extensive and important one, and was to take a considerable time. In view of the defence raised, it becomes important to discover what were the exact relations between Ford and the defendants, what was the scope of Ford's duties, and what rights, if any, of supervision, and control the defendants reserved to themselves. Under the contract the work had to be done in the best and most workmanlike manner, and

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to the entire satisfaction of the Municipal clerk of the works or other person appointed by the Council; the contractor had to accept the decision of the clerk of the works in all points connected with the work, and the latter was to be sole arbitrator as to the soundness and nature thereof. Under the conditions annexed to the contract, the Mayor and Council are entitled to deviate from the specifications in any particular without vitiating the contract; the contractor had to remove at his own cost any materials or rubbish which might result from the execution of the work within such period, and to such place as should be directed by the clerk of works; if any work was, in the opinion of the clerk of works, executed improperly, the contractor was bound to rectify it, and if he refused, other persons might be employed at his expense to do so; defendants or persons deputed by them were to be at all times allowed to inspect the works, and the works might be stopped if the contractor was found to be employing insufficient or improper workmen. Further, the Mayor and Council might stipulate the periods within which any particular portions of the works should be completed, and if not done within such periods they might discontinue the works, and employ other persons in place of the contractor. Lastly, the contractor was responsible for all damage to persons or property arising out of the contract, and in the event of accidents to persons, the contractor had to indemnify the Council from all claims. It will be seen from the clauses quoted above, first, that such work as the contractor had to do was to be done under the close and constant supervision and control of the Council or their officers; secondly, that no provision was made empowering the contractor to close the road or any portion thereof during its reconstruction, or requiring him to fence off or light any portion for the protection of the public, who might be using the road whilst remaining open. The right of closing the road and the duties of fencing and lighting, it must therefore be presumed the Council contemplated reserving to themselves. And with regard to the actual exercise of supervision and control the evidence, fully supports the above view as to the Council's position. The Secretary says: "The clerk of the works supervised the work in St. Peter's Road under the contract," and Lloyd, the clerk of the works, says: "I had control over the contractor; my control

amounted to seeing that the contract was carried out." And referring to the work at the spot where the accident happened, he says: "I had control over this work till it was finished. If I found one of Ford's workmen making any obstruction in St. Peter's Street, I would have stopped him;" and although he says in one place "I had no control over the workmen," he adds when recalled, "I would interfere with the workmen in serious matters, if Ford was not there." Ford, who was called for the defendants, says the clerk of the works had control of the work. As clerk of the works he could at any time interfere with any of the workmen, and he from time to time pointed out defects in the work. It is clear from Lloyd's own evidence that he was visiting the work about the time of the accident, and one of the plaintiff's witnesses says: "I know the Town Engineer employed: I frequently saw him at this road during its construction." With regard to closing the road, Lloyd's evidence shews that he considered that the Council, and not Ford, were the proper parties to do this if necessary, but he says he did not close it, in order that public traffic might not be inconvenienced, although he knew it was in a dangerous state at the time of the accident. He further stated that it was Ford's duty to have lighted the road, and Ford says that he did place a light a little lower down than the place where plaintiff fell, but it is clear that there is nothing in the contract to compel him to do so, and it also appears that there was a municipal lamp near the pit, which, however, was unlighted on the night of the accident. The Municipal Regulations were not put in, but Lloyd stated that there was one which required that lights should be placed in a street when building is going on, or material being deposited. The Town Council is constituted under Act 23 of 1880, s. 36 of which provides that the Council shall have power and authority to make, construct, and repair the roads, streets, etc., within municipal limits. This section is very similar to s. 156 of the General Municipal Act, 45 of 1882, but under the East London Act, the property in the streets is not actually vested in the Council as it is under s. 159 of the General Act. In view of the fact that this was a recognised street under Municipal control, and that repairs were being done upon it by Municipal authority, it is clear that the Council would be liable for any misfeasance in undertaking work of this

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character, even if there was no duty upon them originally to undertake it. The latest case in which this principle was laid down in the Supreme Court is *Jordaan* vs. *Worcester Municipality* (10 Juta, 159). That there was negligence in the manner in which the street was left on the night in question is clear. The sole point therefore to be decided is whether the contract between the defendants and Ford frees the former from all liability for an accident caused by a fall over this bank and into this excavation, which were not constructed with the actual knowledge, or by the direct order of the clerk of works. Many English cases have been cited, but I do not think it necessary to quote more than one or two of them. For the distinctions drawn in the numerous reported cases arise from the application of recognised principles of law to different states of fact. In the case of *Bower* vs. *Peate* (1 Q. B. D., p. 321), Cockburn, C.J., quoted with approval the judgment in *Pickard* vs. *Smith* to the following effect: "If an independent contractor is employed to do a lawful act, and in the course of the work, he or his servants commit some casual act of wrong or negligence, the employé is not answerable." That rule, is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do, and by a parity of reasoning to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer and neglects fulfilment, whereby an injury is occasioned. The condition of the side walk in the present case does not appear to have been due to any casual act of wrong or negligence: for although Lloyd says it was not necessary for any purpose whatever to dig a hole or bank at the spot 2ft. 6in. deep, he also admits that if the hole or bank at the spot was there, it would have been made by the contractor in the natural course of things to get material; and this seems consistent with the specifications which provide that the road should first be properly completed, and after that the footpaths or side walks dealt with and levelled. He also says that the road could not be in other than a dangerous state at the time of the accident. In *Pendlebury* vs. *Greenhalgh* (1 Q. B. D., p. 36) a somewhat similar case, Lord Cairns in giving judgment holding defendant, a surveyor of highways, liable, said, "The first question, as in most of the cases; is one of

fact, and we have to ascertain what was the precise state of facts with regard to the steps taken by the defendant to carry out the work. Now the work to be done consisted of four parts, the materials, labour, superintendence, and as incident to the work, lighting and fencing during the night. If the defendant did not contract for the fencing and lighting, then the duty of fencing and lighting remained in the defendant, for which he remained responsible." So in the present case there was nothing said about lighting or fencing in the contract, and the Council must therefore be regarded to have intended to have dealt with these matters themselves, and to be liable in default of so doing. I am therefore of opinion that upon the evidence given and the terms of the contract, this was not such an entirely independent contract as to substitute Ford for the Council with respect to liability for the condition of the street during its reconstruction. The Council reserved to themselves the right of supervision and control throughout the progress of the work, and their officer exercised such, and was exercising it at the date of the accident. But it is not necessary to decide whether this supervision of the actual work would be alone sufficient to make defendants liable, for the Council did not contract with Ford for the lighting or fencing, and therefore are responsible for a dangerous condition of the street, which proper lighting and fencing would have obviated. They were therefore guilty of negligence in not either closing the road entirely, a step which the nature and magnitude of the operations would seem to have demanded, or taking care that due warning was given to persons using the road, of its condition, which, according to their own clerk of the works, was, to his knowledge, dangerous at the time of the accident. The Council being in charge of the roads, and having undertaken the reconstruction, it was their duty to have had the same properly carried out, and they cannot rid themselves of responsibility by merely agreeing with the contractor to execute the manual work of repair under their directions. In order for a defence of this kind to be successful, it would have to be shewn that the contractor had very much wider powers than were given to him by the documents put in, which certainly appear to contemplate that the Council should still remain responsible to the public, the contractor

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indemnifying the council against loss through injury by accident. The principles laid down in the cases above referred to appear to me consistent with the case of *Kotze* vs. *Ohlssen's Breweries* (9 Juta, p. 319), relied upon by the Magistrate, and with the other cases in the Supreme Court referred to in the argument. Holding that there was ample proof of negligence amounting to misfeasance on the part of the Council in allowing the road to remain in this admittedly dangerous state on the night in question, I concur that this appeal should be dismissed with costs.

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PART II.

HAWKEN *vs.* MORRIS AND TOWN COUNCIL OF GRAHAMSTOWN.

Municipality—Election—Qualification of candidates.

Where at the nomination of candidates for the office of town councillor of a ward in Grahamstown a candidate was nominated who was already a member of the council for another ward, but whose period of office expired on the day following the nomination Held, *that his being a member of the council on the day of nomination was not a disqualification which disentitled him from being nominated, and that his nomination and subsequent election were valid.*

When the holder of an office is elected to another incompatible with it, the acceptance of the second office ipso facto *renders the first vacant, but the holding of one office is not a disqualification for either nomination or election to a second incompatible one.*

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Hawken *vs.* Morris and Town Council of Grahamstown.

The plaintiff in this case, Matthew Hawken, applied to have the election of J. T. Morris to represent Ward No. 8 on the Grahamstown Town Council declared null and void, and that the applicant should be declared duly elected to represent the said ward.

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From the plaintiff's petition and the answering affidavits it appeared that the Grahamstown Town Council consists of twenty-four members, three for each of the eight wards; that it is provided by statute that on the first Wednesday in July of each year one member for each ward retires and his successor enters upon office on the following Thursday; there is a clause in the Act providing that every member so retiring shall be eligible for re-relection. The first Wednesday in July, 1894, was the 4th of July, and J. T. Morris, who had represented Ward No. 5 on the council, was the retiring member for that ward, as was duly proclaimed by a notice from the mayor. At the end of June a vacancy arose in the representation of Ward No. 8, owing to the death of Mr. Webb, one of its representatives, and Tuesday, July 3rd, was fixed as the day to receive nominations to fill up this vacancy. On July 3rd Mr. Morris and the plaintiff were the only candidates nominated for Ward No. 8. The plaintiff lodged an objection to Mr. Morris' nomination being received, on the ground that he was still sitting member for Ward No. 5, and he claimed the seat for himself, and next day tried to assert his claim by taking his seat in the Council. The mayor, however, refused to declare him elected, and by a notice dated July 5th, appointed July 24 as the polling day for Ward No. 8. On that day plaintiff took no active part in the election, and Mr. Morris received a majority of votes and was declared duly elected.

It further transpired from the affidavits that the election to fill up the vacancy in Ward No. 5, caused by Mr. Morris' retiring in rotation, had through a mistake (which does not however affect this case) taken place on June 22nd, whereas by the Grahamstown Municipality Act it should have taken place on the first Wednesday in July, the same day on which candidates vacate office; also that Mr. Morris and a Mr. Trower were candidates, and that Mr. Trower was elected, coming into office on Thursday, July 5th; so that although Mr. Morris was a councillor on the day of nomination for Ward No. 8, he had ceased to be one before the day of election.

Maasdorp, S.-G., for plaintiff. The Acts regulating the election to the Grahamstown Town Council are 23 of 1869

and 12 of 1878. S. 28 of the earlier Act, as amended by s. 5, Act 12 of 1878 (not repealed by it as Tennant's edition of the Statutes states) provides for the retirement in rotation of one member of each ward, and that the new councillor elected to fill the vacancy shall enter into office on the first Thursday in each July. Councillors so retiring are by a special clause made eligible for re-election to fill the vacancy caused by their retiring, so they can be nominated although holding office on the day of nomination, but there is no such clause in s. 29 of the earlier Act, which provides for the filling up of vacancies caused by death, &c. Mr. Morris was a councillor on July 3, and therefore could not be nominated as candidate for the vacancy in Ward No. 8, caused by Mr. Webb's death; and as s. 4 of the latter Act provides that if only one candidate be nominated to fill one vacancy, it shall be competent forthwith for the mayor to declare him duly elected, plaintiff ought to have been elected. To hold that an existing councillor can be elected for another ward would be practically to disfranchise one ward.

[PER CURIAM. The question is not whether he could be elected, but whether he could be nominated.]

The one is a test of the other; if he had been nominated and there had been no other candidate he would have been entitled to be elected. S. 5 provides for members who retire by rotation being re-elected to the vacant seat; there is no such proviso in the case of death vacancies, and *expressio unius exclusio alterius est.* In English Parliamentary elections an already sitting member cannot become a candidate for a vacant seat. (Rogers on Elections, p. 42.)

Blaine, for defendant Morris. The alleged disqualification is not found among the disqualifications enumerated in either Act. The question is not who can sit as councillor or even who can be declared elected, but who can be nominated, and whatever the case may be about the two first, there is no disability attaching to a councillor of being nominated for a vacancy. If he had been the only candidate, he need not necessarily have been declared elected that day, s. 4 only says "it shall be competent for the mayor:"—

[PER CURIAM. Why is there a clause providing for the re-election of retiring councillors inserted in s. 5, if an existing councillor may be nominated for any vacancy?]

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It is inserted merely formally and to shew that having enjoyed one term of office does not prevent the holder from entering on another consecutively, as is the case in some corporate bodies. Election to and acceptance of a new office produces the extinction of an earlier incompatible one (*Q. v. Mayor, Town Council and People of Bagnor*, 18 Q. B. D. 349), so Morris when elected for No. 8 would *ipso facto* cease to represent No. 5, and all legal incompatibility disappears.

Sampson, for defendant mayor and council. Only prohibition in the Act of 1869 is as to who shall be elected, not as to who shall be nominated, as Mr. Morris' disqualification (if there was any) had ceased before he was either declared elected or taken his seat, no illegality has taken place.

Cur. adv. vult.

Posteà (Aug. 16).

JONES, ACTING J.P.: The applicant, Mr. Hawken, asks the Court to declare him a duly elected councillor in the place of Mr. Webb, who died some time back. The facts upon which he bases his claim are these. It seems that the Mayor in the usual way called for nominations for candidates for the position of councillor in the place left vacant by the death of Mr. Webb, and fixed the 3rd of July as the date upon which these nominations would be received. The applicant and Mr. Morris (one of the respondents) were duly nominated, and the 25th July was appointed as the day for the election. Now Mr. Morris was already a councillor for another ward, though he would only hold his office until the next day, when the annual election would take place. It is contended that the fact that Mr. Morris was still a councillor on the 3rd July rendered him disqualified as a candidate at this election. The qualifications and disqualifications are stated in Act 28 of 1869, ss. 11 and 12, and in Act 12 of 1878, s. 2.

S. 11 of the former Act provides:

> No person shall be eligible to be elected a councillor for any ward who [has been convicted of certain offences], or who has not been an occupier of immovable property within the municipality of the yearly value or rental of not less than £10 sterling for not less than twelve

months next before the election, or who is the occupier of any such property in regard to which any municipal rate shall at the time of the acceptance by such person of such requisition as is mentioned in the next section be due and in arrear . . . .

S. 12 provides:

No person shall be deemed a candidate at any election, nor qualified to be elected a councillor for any ward unless he shall have been invited to become such candidate by a requisition signed by at least three qualified voters of such ward, and shall have transmitted such requisition with his acceptance thereof to the mayor, at least fourteen days before such election is appointed to take place."

By the latter Act it is provided:

S. 2. No person shall be eligible as a candidate at any election, nor qualified to be elected a councillor for any ward, unless he be a registered citizen, and shall have been invited to become such candidate by a requisition, signed by at least three qualified voters of such ward, and shall have transmitted such requisition with his acceptance thereof to the mayor, as is provided for in the following section.

S. 3. When the seat or seats of any councillor or councillors shall become vacant, the mayor shall, under his signature, give notice of such vacancy or vacancies in any one of the local newspapers, and shall therein appoint a day, not later than seven days from the first publication thereof, for the purpose of considering and determining upon such requisitions as shall be addressed to any candidate or candidates to fill up such vacancy or vacancies, but such requisitions and the replies thereto shall be delivered at the Town Office not later than 3 o'clock P.M. on the day so appointed.

S. 4. If on the day appointed, as in the preceding section mentioned, there shall be no more requisitions delivered at the Town Office than are sufficient to fill up such vacancy or vacancies, it shall be competent for the mayor, without any further action or proceeding, to declare the candidate or candidates who have accepted the requisition duly elected a member or members of the council, but if the requisitions to candidates exceed the number of vacancies to be filled up, then all such requisitions shall be published by affixing the same on some conspicuous place in the Town Office; and the mayor shall within three days thereafter publish the names of the several candidates in one of the local newspapers, and at the same time therein give fourteen days' notice to the citizens, calling a meeting for the election of councillors to fill up the vacancy or vacancies, and in such notice he shall also state the date, hour, and place of such meeting.

S. 5. At every yearly election, which shall take place on the first Wednesday in July of each year, there shall be elected one councillor for each ward, who shall enter upon his office on the first Thursday after his election, and continue therein for three years; and every retiring councillor shall be eligible for re-election."

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It has been suggested that Mr. Morris could not be nominated for the seat already vacant because, if he were the only candidate, the Mayor might have had to declare him elected forthwith, and in that event he would fill two seats at the Council Board, which would be absurd. We have not, however, to deal with a case of this kind, and it will be time enough to decide such a question when it arises. It must be admitted that no disqualification for nomination at a municipal election of the kind suggested has ever been declared by Statute, and Statutes creating disqualifications of this kind must be interpreted strictly.

Assuming that in all other respects the candidate was duly qualified, we have to consider whether there is anything in law which would prevent a person whose term of office ended on the 4th July, submitting himself for nomination for a seat which he need not occupy until after this date, until in fact the only objection to his qualification had terminated.

Now great reliance has been placed by the Solicitor-General upon Parliamentary law; May says, "It is a settled principle of Parliamentary law that a member, after he is duly chosen, cannot relinquish his seat, and in order to evade the restriction, a member who wishes to retire accepts office under the Crown, which legally vacates his seat and obliges the house to order a new writ" (Sir E. May's *Parliamentary Practice*, 7th ed. p. 637). It is not surprising, therefore, to find that, "by the law of Parliament a member sitting for one place cannot be elected for another, but must vacate his seat by accepting the Chiltern Hundreds or some other office under the Crown in order to be eligible as a candidate." This disqualification for nomination in a parliamentary election need not, however, be introduced into municipal elections, and in England this peculiar disqualification does not appear to be recognised in municipal elections. There seems to be nothing in English Common Law to prevent a person being nominated for a vacancy while he still is a councillor, though of course he could not occupy two seats as councillor. The only cases relating to this question which have been cited in argument are *R.* vs. *Coaks*, 3 E. & B. 249, and *R.* vs. *Mayor of Bangor*, 18 Q. B. D. 349, and neither of these supports the position taken up by the applicant in the case before the Court.

It seems from *Milward* vs. *Thatcher*, 2 T. R. 81 (cited in 1 Douglas's Rep. 398), that the rule is that when two offices are incompatible, the subsequent acceptance of one vacates the other. (See also *R.* vs. *Tissard*, 9 B. & C. 418; *R.* vs. *Day*, 9 B. & C. 702; *Staniland* vs. *Hopkyns*, 9 M. & W. 179.)

The case of *R.* vs. *Coaks*, if good law, would (as Lord Esher pointed out) have overruled a series of cases which preceded it, though they had never been mentioned or cited in argument; in it the ineligibility of the person holding office as a validly nominated candidate was never disputed by counsel, but was specially admitted in the special case before the Court. The case of *R.* vs. *Mayor of Bangor* is a very strong one against the applicant's contention. The head-note in it is as follows: "At an election for the office of a councillor of one of the wards of a borough, R. and P. were the only candidates. At the close of the poll P. objected that R. was disqualified for election by reason of his being an alderman of the borough whose term of office had not expired, and P. claimed himself to be elected whatever might be the result of the poll. *Held* (1) that R. was not, by reason of his being alderman, disqualified for election to the office of councillor, and that by accepting the latter office he vacated the former. In his judgment Lord Esher, M.R., is reported to have said: "First, was R. ineligible as a candidate for the office of town councillor? Now there is no express enactment that an alderman cannot be elected a councillor, but it is suggested that there is a necessary implication that he cannot be. It has been said that the offices are incompatible, and that two incompatible offices cannot be held by the same person at the same time. . . . A long series of decisions has upheld the proposition that when two offices are incompatible, and the suggested ineligibility of the candidate for one of them only arises from the fact that it is incompatible with the office he already holds, he is not thereby prevented being elected to the second office, whether it be superior in rank or power to the other or not. The cases have decided that if a person holding one office be elected to another, and accepts that election, he thereby vacates the office he has held, and then the difficulty with respect to the impossibility of holding two incompatible offices is got rid of. *R.* vs. *Coaks* is said to have been in conflict with these decisions; . . . now this

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case was decided upon a special verdict, and the Court could not look beyond the facts found by that verdict; it is therefore not a decision of the Court that an alderman is ineligible for election as councillor."

So the acceptance of the second office renders the first office vacant, but the holding of a first incompatible office does not in itself create a disqualification of such a character as to prevent the candidate accepting the second office.

That there is nothing very objectionable in a person being nominated for a seat before the period for which he has already been elected has completely expired is clear from the fact that this course is specially allowed in the case of Grahamstown councillors, whose period of office terminates by effluxion of time. For by Act 12 of 1878 it is provided that at every yearly election, which shall take place in the first Wednesday in July of each year, there shall be elected one councillor for each ward, who shall enter upon his office on the first Thursday after his election, and continue therein for three years, and every retiring councillor shall be eligible for re-election.

In order to carry out this provision of the law it would seem necessary that the Mayor should give notice of the vacancies which were about to occur before the seats actually became vacant, and receive nominations before the councillors, who are eligible for re-election, have actually vacated office. Under Act 23 of 1869 the Mayor or any councillor can resign if he sees fit, and therefore cannot be said to occupy precisely analogous positions to members of the English Parliament, who in theory at least cannot resign.

On the whole, therefore, the Court is of opinion that the application should be refused with costs.

MAASDORP, J., concurred.

QUEEN *vs.* BROWN.*

Act 35 *of* 1893, *ss.* 22 *and* 28—*Theft—Ostrich Feathers.*

A conviction for the crime of contravening s. 22, *Act* 35 *of* 1893, *set aside, there being no evidence that the produce which the accused had received into his possession was stolen produce.*

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Queen *vs.* Brown.

Review of a decision of the Resident Magistrate of Port Elizabeth.

The prisoner was accused of the crime of theft of produce under the provisions of s. 28, Act 35 of 1893. This section provides: "If there be reasonable grounds for believing that any person is or has been in unlawful possession of any stock or produce, it shall be competent for any justice of the peace, field-cornet, landholder or police-constable to apprehend or cause to be apprehended such person without warrant and convey him or cause him to be conveyed in custody before any Resident Magistrate having jurisdiction, and if it be found that he is or has been in possession of any such stock or produce and is not able to give a satisfactory account of such possession to such Magistrate he shall be deemed to be guilty of the crime of theft of stock or produce and shall thereupon be dealt with as if he had originally been charged with such crime." S. 30 of the same Act provides, "Any person charged with theft of stock or produce in accordance with either of the last two sections may, if the court or jury before whom he is tried be satisfied that he had no guilty knowledge that the stock or produce forming the subject of the charge was stolen, be dealt with in all respects as though he stood charged with a contravention of s. 22 of this Act." The provisions of s. 22 are as follows: "Any person who shall by way of purchase bargain exchange or gift acquire or receive into his possession from any other person any stolen stock or stolen produce without guilty knowledge that the said stock or produce is stolen but without reasonable cause, proof of which shall lie on such first-mentioned person, for believing at the time of

* Before BARRY, J.P., in chambers.

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such acquisition or receipt that such stock or produce was the property of the person from whom he received it, or that such person was duly authorised by the rightful owner to deal with or dispose of it, shall be deemed guilty of contravening this section and shall be liable on conviction to a fine not exceeding one hundred pounds or to imprisonment with or without hard labour for a period not exceeding 12 months or to both such fine and such imprisonment."

From the evidence it appeared that the prisoner was a licensed ostrich-feather buyer, and that the Inspector of Police, in September last, on examining prisoner's register, found a parcel of feathers weighing 20 lbs. 7 ozs. entered in it as "bought from M. Müller." The feathers corresponding to this entry were pointed out by the prisoner in two lots, one left by himself at the Market Office, and the other handed by him to another feather dealer to sell for him. These lots differed from an ordinary plucking in containing fewer tail and short feathers. The police failed to find any trace of a M. Müller in or about Port Elizabeth. For the defence, prisoner stated that on the 28th of July he saw a farmer with a bag standing in the street beside the Masonic Hotel. He asked him if he had feathers for sale in that bag, and on his replying "Yes," took him to a shop in Titterton Lane, and having first gone out and obtained an ostrich buyer's licence, purchased the feathers for £44 7*s.* 6*d.* He gave this sum to Müller, and obtained a receipt (produced), but did not make any inquiries as to where he lived, etc. He had not seen Müller before or since.

On this evidence the Magistrate "considered that there was some evidence that the prisoner had been guilty of indiscretion and of purchasing feathers without a guilty knowledge, but without taking the care to make the inquiries necessary in law." Therefore, under the provisions of the 30th section, he proceeded to impose a fine as if prisoner had been convicted of contravening s. 22 of the Act. A fine of £5 1*s.* or one month's imprisonment with hard labour was imposed.

King (for appellant): s. 22, under which the prisoner was convicted, requires that the Crown shall prove that the property found in his possession was stolen property; in this it differs from s. 28. There is no evidence whatever

that these feathers were stolen, they may have been lawfully in Müller's possession.

[*Per* CURIAM: Theft of produce must be judged by the ordinary rules of evidence in conjunction with the special provisions of s. 28. In the absence of any satisfactory explanation from Müller, does not that section create a presumption that the feathers were stolen by him?]

Not till he is brought before a Magistrate and asked to furnish such an explanation. Even then it is doubtful whether he would be convicted (see *Q.* vs. *Plaatjes*, 4 E. D. C. 267, dealing with a precisely similar section). Consequently the conviction under s. 22 must be set aside. It is unnecessary on the Magistrate's view of the facts, to argue that a conviction under s. 28 would also have been untenable.

Maasdorp, S.-G. (for the Crown), admitted that there was no evidence that the property was stolen.

Posteà (Nov. 2nd).

BARRY, J.P.: The accused in this case is charged with the crime of theft of produce under the provisions of s. 28, Act 35 of 1893; and, as is provided by s. 30 of this Act, he was dealt with as if he stood charged with a contravention of s. 22, and was convicted. It is contended that the evidence does not support the conviction. According to the evidence, twenty pounds of feathers were traced to the possession of accused, who stated that he got them from a man called Müller; he was unable to give Müller's address, but produced a receipt he had received from him for the price of the feathers. His own account is that on the 28th July he saw a farmer in Main Street with a bag, who, on being asked whether he had feathers in the bag for sale, said that he had, and was brought by the accused to his brother's shop in Titterton Lane, and the sale took place there. The Resident Magistrate considered there was evidence that the accused had been guilty of indiscretion and of failing to make the inquiries necessary in law, but that he had no guilty knowledge. It is evident from this that the Magistrate believed the accused's statement that he had bought these feathers from the farmer. To justify a

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conviction under s. 22 it would be necessary to find that the feathers were stolen by the farmer, or before they came into his possession. The Resident Magistrate could not do so unless the farmer failed to give an account of how they came into his possession. It is evident that he was never asked to do so, and consequently there are no grounds for for concluding that his possession of them was unlawful. Proof that the produce in question was stolen being a condition precedent to a conviction under the section this conviction must be quashed.

QUEEN *vs.* NEL AND NEL.*

S. 6 *Act* 33 *of* 1888—*Scab Act—Certificate—Summons.*

When a prisoner is charged with the statutory offence of signing a certificate [*as required by Act* 33 *of* 1888] *"which is to his knowledge false in any material particular" the summons must state in what respect the certificate is alleged to be false.*

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Review of a decision of the Resident Magistrate of Cradock.

David H. Nel and Philip J. Nel were charged with the crime of contravening s. 6 Act 33 of 1888 in that, on the 21st day of September 1894, at Kron River, they did each of them wrongfully and unlawfully sign a certificate, as referred to in s. 5 of the said Act, which was and is, to the knowledge of each, false in regard to all or one or most of the material particulars in it.

From the evidence it appeared that John Nel, a brother of the two accused, residing in the Cradock district, sold 210 sheep which he wished to have removed by train to Port Elizabeth. To do so it was necessary to get a permit from the Scab Inspector, and as a preliminary to this, a certificate signed by two landowners in the district. The accused signed a certificate as follows, on September 27th: "We, the undersigned residents and landowners, certify that we examined 210 sheep belonging to John Nel and found

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* Before BARRY, J.P., in chambers.

them free from scab." On the next day the Scab Inspector saw the 210 sheep and found some of them were scabby and must have been so for at least five days. Besides, P. J. Nel was not an owner of land in the district. For the defence, evidence was led that on the 24th D. H. Nel had examined John Nel's entire flock and found them free from scab, but had made no separate examination of the 210 sheep; and that P. J. Nel, seeing the 210 driven past his residence on the 27th, had examined them, though he did not at the time know that he would be asked to give a certificate. P. J. Nel also stated that he did not know he was signing as landowner, and thought he signed as agent of his aunt, whose farm he managed.

S. 5 of the Act provides:—

. . . . every inspector may lawfully refuse to grant any such permit in respect of any sheep unless and until the person desiring it shall produce and exhibit and deliver to such inspector a certificate signed by two landowners resident in the field-cornetcy from which it is desired to remove such sheep, to the effect that the said sheep are entirely free from the disease called 'scab,' which certificate shall as nearly as may be follow the form prescribed in the second schedule of this Act."

S. 6 provides:—

Any person signing any such certificate as is referred to in the last preceding section which shall be to his knowledge false in any material particular, and any person using such certificate in respect of any sheep other than those therein referred to shall be liable upon conviction to a fine not exceeding twenty pounds."

The accused were found guilty and fined each £5 1*s*.

Sampson (for appellant): Firstly the summons is bad in law as it does not bring fairly to the prisoner's knowledge what he is charged with; it does not show which particular in the certificate is alleged to be false: *Q.* vs. *Burg*, 1 S. 93, *Q.* vs. *McGlashan*, 9 E. D. C. 9. Secondly, the evidence does not support the conviction; it is impossible from the state of the record to find what falsity the Magistrate found proved, and on no head is there clear proof. Either the summons should be quashed as informal, or if not the Magistrate should be asked on which issue he found them guilty and his reasons.

Maasdorp, S.-G. (for Crown): As regards the sufficiency of the summons, there are very few material points in the form

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of certificate given in the Schedule, and still fewer in that signed by accused. It is quite clear that the Magistrate found the certificate false in stating that either accused had examined the flock and that P. J. Nel was a landowner.

BARRY, J.P.: The Magistrate will be asked to furnish details as to the particular charge he found proved, and his reasons for it.

Posteà, Nov. 15 (before the full Court)

The Magistrate's reasons were produced, stating that he found the certificate false in that no joint examination was made, no *bonâ fide* examination was made, the sheep not having been handled, and also Philip Nel when he signed knew that he was not a landowner.

Per BARRY, J.P. The summons is bad in that it does not state in what respects the certificate is false and the whole proceedings must therefore be quashed. A great deal of evidence was led before the Magistrate and out of it three or four distinct charges could have been picked out; the accused had a right to know on which of these the Crown intended to proceed.

JONES and MAASDORP, JJ., concurred.

NEWMAN *vs.* TOWN COUNCIL OF EAST LONDON.*

Negligence—Proximate cause—Independent contractor—Liability of employer.

When a contract provides for the execution of certain work, including every kind of labour and material and no control or power of dismissal is retained by the employer over the contractor's labourers, the contractor is an independent contractor, even though the contract provides that the employer may stop the work if the contractor continues to employ an inefficient or inattentive workman, and that the employer's agent shall be the sole arbitrator as to the quality of the work provided and executed.

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* Before BARRY, J.P., as Circuit Court Judge.

When an independent contractor is employed to do work, he alone is responsible for injuries caused by negligence in the execution of the work, unless the act causing the injury is an act which the contractor was employed to do, or a necessary consequence of the work committed to him.

When a horse takes fright at an obstruction in the road caused by A. and becoming unmanageable bolts with a carriage and its occupants in the direction of an excavation caused by B., and one occupant of the carriage jumps out to avoid being precipitated into the excavation and is injured, B. is not liable in damages; as if there is any liability it is incurred by A., A.'s obstruction and not B.'s excavation being the proximate cause of the accident.

EAST LONDON MUNICIPALITY *vs.* MURRAY, 9 E. D. C. 55, *distinguished.*

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Action for £2500 damages for injuries suffered in consequence of the negligence of defendants. The evidence was taken before BARRY, J.P., at the Circuit Court at East London, and the case removed to Grahamstown for argument.

The plaintiff's declaration stated that he is an auctioneer and forwarding agent residing in East London; that on or about the 1st day of August, 1893, the defendants, who are vested with the control and management of all roads within the municipal limits of East London, were repairing and constructing St. Peter's road within the said municipality; that in breach of their duty to carry on all operations on a road left open for traffic in a manner consistent with the safety and protection of persons passing along the said road, they negligently and carelessly placed several barrels of cement, with a loose sail over them on one side of the road, and dug a deep hole or excavation, and placed a heap of large stones near the said hole on the other side of the road, leaving a distance of about fourteen feet between the said casks and the said hole and stones; that the said hole or excavation was not fenced in in any way, and the sail upon the said casks was not properly or securely fastened; that by reason of the said careless and negligent acts of the defendant the plaintiff's horse, drawing a cart in which the plaintiff was driving, on the said 1st August, 1893, was, on

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coming up to the said casks, suddenly frightened by reason of the said sail flapping, and swerved and ran away with the said cart directly towards the said hole and stones; and that the plaintiff to save himself from being precipitated into the said hole, which he saw no chance of the cart escaping, jumped from the said cart, and in doing so fell against the said stones already referred to and had his leg broken in two places, suffering much pain and permanent injury.

The defendants besides the general issue pleaded specially: (1) That on the 17th July, 1893, the defendants entered into a contract with one Charles Ford (which contract was only signed on the 2nd day of August, 1893,) under which Ford was an independent contractor free from all control by defendants, and that the Acts and omissions complained of were done by the said Ford independently of the defendants. (2) That the plaintiff was guilty of contributory negligence in that without any necessity or just cause he jumped out of the cart on to the said stones, and that the injury, if any, sustained by him was due to this negligence on his part, and not to any negligence on the part of defendant.

From the evidence it appeared that in July, 1893, the Town Council of East London entered into a contract with Charles Ford to do certain work for them according to specifications, and agreed to pay him £24 for every chain of roadway constructed according to these specifications. The specifications included the widening of St. Peter's Road by 33 feet, so as to make it twice its existing width, and the extension of the existing culvert by building a further culvert across the new part of the road; the new culvert was to be well tied into the existing culvert, and the site for it was to be excavated until it reached bed rock.

The contract provided amongst other conditions—

> This contract is to include all and every kind of labour and material which may be required for and in the construction of the several works to be performed, and for the full and entire completion of the work as shown in the specifications.
>
> The mayor and council reserve to themselves the right of deviating from the plans and specifications either by adding to or diminishing therefrom, without thereby retracting the contract.
>
> The contractor is to remove at his own cost any material or rubbish which may result from the execution of the work within such period, and removed to such place as shall be directed by the clerk of works.

If it shall appear to the clerk of works that any work has been executed with unsound and imperfect materials, or unskilful and imperfect workmanship, the contractor shall rectify and reform or reconstruct the same in whole or in part.

The mayor and councillors, or any person deputed by them, shall at all times be allowed to inspect the work in progress.

The contractor shall not continue to employ upon the works any artificers or labourers who may be found inefficient or inattentive, or who shall act improperly, and in case the contractor shall refuse to dismiss such objectionable persons the mayor shall be at liberty to stop the work.

The contractor is responsible for all damage to persons or property arising out of this contract, and in event of any accident from insufficient protection the contractor shall indemnify the council from all claims on account thereof.

The clerk of works, or other person appointed by the council, shall be sole arbitrator as to the quality of the materials, and as to the quality of the work provided and executed under the contract.

(This contract was the same one considered in the case of *Murray* vs. *Town Council of East London*, 9 E. D. C. 55.)

In the course of the execution of this work, on the 1st August, 1893, six barrels of cement covered with a sail were left in the morning by Ford's workmen standing on the side of the road; they projected about 3 or 4 feet into the roadway, which was altogether 33 feet wide, and there was evidence to shew that just after the accident the sail was flapping in the wind, but none to shew whether this was so at the time the accident occurred. On the opposite side of the road, and slightly lower down, the building of the new culvert involved an excavation in the ground which was to form the extension of the old road; the excavation reached to the edge of the old road, where the new culvert was to be tied into the old one, was about 8 feet deep, and extended about fifteen feet along the direction of the road. The excavation was not fenced in in any way, but beside it and below it (on the opposite direction to that in which plaintiff's cart approached it) a couple of waggon-loads of building stone had been thrown down; these stones projected about 6 feet into the old road, so that between the cement casks and these stones a width of about 25 feet was left for traffic. About one o'clock in the afternoon of August 1st, while the road was in this state, Mr. Newman drove down St. Peter's Road on his way home from his office. He was in a cart accompanied by his nephew, the cart being drawn by a horse which he had had in his possession for 6 months, and

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had frequently driven and found quiet and steady. Mr. Newman was driving, and as he approached the place where the barrels were he saw the obstructions to traffic, so drove carefully at a slow trot. Just, however, as they got to the barrels the horse took fright, bolted, and, in spite of all his efforts to curb it, made straight for the excavation at full speed. When they were just reaching the excavation, fearing the cart would be dashed into it, the nephew jumped out and escaped unhurt; but Newman, jumping a moment later, fell on the piled-up stones, and the cart-wheel passed over his leg, breaking it in two places. The cart just grazed the edge of the excavation, upsetting some clay into it, went for some distance on one wheel between the stones and the excavation, and going off the road was finally stopped by a tree; a foreman working in the excavation at the time jumped out, as he thought the cart was certainly coming into it, and stated in evidence that any reasonable man would, in his opinion, have jumped out of the cart as Newman did.

Sampson (with him, *King*) for plaintiff: A corporation undertaking work of this kind must execute it in a manner consistent with the safety of the travelling public: *Cathcart Divis. Council* vs. *Hart*, 9 Jut. 80; *Jordaan* vs. *Worcester Municipality*, 10 Jut. 159; here there was clearly negligence both with regard to the excavation, the stones, and the cement casks; as to what is consistent with a reasonable user of a road see remarks of GROVE, J. in *Wilkins* vs. *Day*, 12 Q. B. D. 110; *Harris* vs. *Mobbs*, 3 Ex. Div. 268.

The contract plainly shews Ford was not an independent contractor, especially the clauses retaining supervision of the work, the right to insist on the dismissal of incompetent workmen, and reference to the clerk of works in case of dispute as to the quality of the work; *Kotze* vs. *Ohlssen's Brewery Co.*, 9 Jut. 319; *Bower* vs. *Peate*, 1 Q. B. D. 321; *Pickard* vs. *Smith*, 10 C. B. (N.S.) 471; *Gray* vs. *Pullen*, 5 B. and S. 970; and *Murray* vs. *Town Council of East London* (since reported 9 E. D. C. 55) in which this very contract was discussed.

Even if council had given out work to an independent contractor it was their duty to contract that it should be done in such a manner as to protect the public; or else

to have closed the road: *Pendlebury* vs. *Greenhalgh*, 1 Q. B. D. 36; *Murray* vs. *Town Council of East London* (*supra*). Finally, as the work contracted for was in itself dangerous, council cannot escape liability by employing an independent contractor: *Corby* vs. *Hill*, 4 C. B. (N.S.) 556; *Clair* vs. *Port Elizabeth Harbour Board*, 5 E. D. C. 311; *Wright* vs. *Patterson*, 5 E. D. C. 390.

As regards contributory negligence, plaintiff did what a reasonable man would have done under the circumstances: *Addison on Torts* 42; *Hume* vs. *Divis. Council of Cradock*, 1 E. D. C. 104; *Flower* v. *Adam*, 2 *Taunt.* 314.

Maasdorp, S.-G., (with him, *Hutton*) for defendant: The injuries to plaintiff were the result of a pure accident for which nobody was liable. Though the declaration ascribed it to the flapping of the sail, this was not borne out by the evidence, and plaintiff must rely solely on the presence of the casks. The leaving them on the side of the road in the daytime was not unreasonable, and no one could have anticipated this accident as the result: *Walters* vs. *Lucas*, 7 Jut. 153. In *Wilkins* vs. *Day*, a roller had been left right on the road, and in *Harris* vs. *Mobbs*, a van left at the side at night, so these cases were distinguished. The contractor was an independent contractor, and the clauses, *re* supervision, &c., only established the clerk of works as an arbitrator in case of dispute. Real test is the power of dismissing workmen: *Wharton on Negligence*, pars. 181 and 182; *Overton* vs. *Freeman*, 11 C. B. 867; *Sadler* vs. *Henlock*, 4 El. & Bl. 570; *Murray* vs. *Currie*, L. R. 6 C. P. 24; *Murphy* vs. *Carally*, 3 H. & C. 462; *Butler* vs. *Hunter*, 7 H. & N. 826; *Hole* vs. *Sittingbourne and Sheerness Ry. Co.* 6 H. & N. 488; *Ready* vs. *L. & N. W. Ry. Co.* 4 Exch. 244; *Quarman* vs. *Burnett*, 6 M. & W. 499; *Brown* vs. *Accrington Spinning Co.* 3 H. & C. 511; *Taylor* vs. *Samuel Greenhalgh*, 9 Q. B. 487.

Sampson, in reply: Even supposing contractor alone is liable for the frightening of the horse by the barrels of cement, the council are liable for the excavation, which they specially contracted to have made, and which materially contributed to the accident: *Pollock on Torts*, 391; *Graan* vs. *Juring*, 2 Jut. 308; *Nitro-Phosphate Co.* vs. *London and St. Katherine Docks*, 9 Ch. D. 503.

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Posteà (Nov. 15):

BARRY, J. P.: Plaintiff, an auctioneer, broker, and shipping and forwarding agent, East London, sues the East London Town Council for £2,500 as damages for an injury sustained by him on 1st August, 1893. The plaintiff alleges that on that day the Council being vested with the control and management of all roads within the municipal limits of East London, were repairing and constructing those in the road known as St. Peter's Road, and, in breach of their duty, placed several casks of cement with a loose sail over them on one side of the road, and dug a deep excavation and placed a large heap of stones near it on the other side of the road, leaving a distance of about 14 ft. between the casks and hole, and stones, the excavation not being fenced nor the sail securely fastened. By reason of these negligent acts, plaintiff's horse, drawing a cart in which plaintiff was driving, was suddenly frightened by the sail flapping, and swerved and ran towards the stones. Plaintiff, thereupon, to avoid being precipitated into the hole, jumped from the cart, and, in doing so, fell against the stones and broke his leg. The defendants, after pleading generally, pleaded specially that on the 17th July, 1893, they entered into a special contract with one Charles Ford, which was signed on the 2nd August. Under it Ford was an independent contractor and free from all control by defendants, and that if the injuries alleged were caused, they were caused by Ford independently and without any interference or control on the part of the defendants, who further specially pleaded that plaintiff was guilty of contributory negligence, because, without any necessity or just cause, he jumped out of the cart on to the stones, and that if any injury was sustained it was due to plaintiff's contributory negligence and not to any negligence on the part of the defendants. I find the facts to be these:—In July, 1893, defendants contracted with Charles Ford to widen St. Peter's Road, at that time 33 feet wide, at the spot where the injury was subsequently sustained. Ford thereby agreed, at his own cost, to execute the whole of the work according to the planned specifications, and to work in a workmanlike manner to entire satisfaction of defendant's clerk of works. Ford agreed to accept the decision of the clerk of the works on all points

connected with work and material. The Council agreed to pay Ford £24 per English chain for every chain of roadway constructed according to specification, the clerk of works being the sole arbitrator as to the nature of the work, soundness, and material. The defendants reserved the right of deviating from the plans and specifications, the contractor to find all tools, tackle, carriage and cartage, and to remove, at his own cost, all material and rubbish which might result upon execution of work; but if it appeared to the clerk of the works that the work was unsound, or material imperfect, the contractor should reconstruct as may be required by the clerk of the works; failing to do so, the defendants should be at liberty to employ other tradesmen to do the work. Acting under this contract, Ford was to continue an excavation at a dip in St. Peter's Road, and building stones were placed near this excavation, occupying about 6 ft. of the existing road abutting on the excavation. On the other side of the road, and occupying about 3ft of that roadway, he placed some barrels of cement and covered them over with a sail. This was done on the 31st July, 1893. No barrier was placed between the old road and the excavation, but, in the day time, the excavation, loose stones and the barrels of cement were very clearly visible, and a space of about 25ft was left open for the traffic. On the 1st August, plaintiff was travelling along this road in his buggy, accompanied by his nephew, a lad of fifteen, and, as he approached that part of the road where the barrels of cement were lying, his horse shied at the cask and bolted in the direction of the stones and excavation. Fearing injury, the lad jumped out with his uncle's approval, and escaped unhurt. Plaintiff, acting as he thought for the best, followed the lad's example, and, jumping out, fell on the fringe of the stones where his leg was broken. Plaintiff was in consequence a sufferer for five months, and has not quite recovered the use of his leg. That morning, in going to business, plaintiff had passed the same spot, when the casks and stones were already there. The plaintiff's contention is that Ford was not an independent contractor and that there was negligence in placing the casks and stones where they were, and also in making the excavation without sufficient protection; that the horse was not to blame, nor the plaintiff; that the injury was caused by a combination

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of circumstances, beginning with the improper position of the barrels, which caused the horse to shy and bolt; and the horse bolting, the plaintiff was obliged (to save himself from being precipitated into the excavation) to jump out, and, jumping, injured himself against the stones improperly placed where they were; that inasmuch as Ford was not an independent contractor, the defendants are liable, having undertaken the reconstruction of the road; that even had Ford been an independent contractor, the defendants would have been liable, inasmuch as they did not contract in a manner to secure the safety of the public, and that the contract itself necessitating the excavation, the defendants cannot be allowed to screen themselves from liability for the negligence of their agent under the contract.

The defence is, first, that plaintiff was the unfortunate victim of a pure accident; and secondly, that if there is liability anywhere, it is in Ford, who was an independent contractor; that, even if the excavation was contemplated by the contract, the public ought to have been warned of its existence at night by lamps and barriers, but there was no necessity for doing so in the daytime, when it was clearly visible; and that at most could the injury be attributed to the scare caused to the horse by the temporary placing of the cement casks on the edge of the road, which was an act not contemplated by the contract with Ford. The rule of law undoubtedly is that the master is answerable for the acts or omissions of servants or workmen while pursuing the course of their employment, and the principal is not answerable for acts or omissions of his agent, to whom the execution of a work is committed without any control or power of direction being reserved as to the manner of executing the work: *Taylor* vs. *Greenhalgh*, L. R. 9 Q. B. 487, and *Pendlebury* vs. *Greenhalgh*, 1 Q. B. D. p. 36. In such a case the contractor alone is responsible for damage done by him in execution of the work: see *Wilfare* vs. *Brigh. Ry. Co.* L. R. 4 Q. B. 696), but this rule does not apply to cases where the act causing the injury is an act which the contractor was employed to do, or a necessary consequence of the work committed to him. Nor is the employer exempted if he commits to the contractor the performance of a duty incumbent on himself; see *Pickard* vs. *Smith*, 10 C. B. (N.S.) 480, and *Tarry* vs. *Ashton*, L. R. 1 Q. B. 314. In the

present case, however, I come to the conclusion that Ford was an independent contractor to whom the execution of the work was committed, without control as to the manner of executing it, and that the defendants are not responsible for Ford's act in placing the cement casks and stones where they were placed. In coming to the conclusion that Ford was an independent contractor, I apply this test: Did the contract with Ford provide for the interference by the Council in the disposition of the stones and cement? No doubt, as caretakers of all roads, the Council had the right to interfere with any one, and, therefore, with Ford, in disposing of anything in such a manner as might become a nuisance; but in order to establish the relation of master or superior in the present case, the contract itself must have provided for the control by the defendants in this particular matter over Ford.

In my opinion, the contract does not. The right to control implies the power to discharge the servants if they had placed the cask and stones where they did, contrary not to Ford's but defendants' orders, or to cancel the contract with Ford for a similar act of disobedience. This I do not think the contract provided. On the other hand, the evidence proves that the excavation was a necessary consequence of the work committed to Ford, and that, inasmuch as there was nothing in the contract providing for the protection of the public during the course of the construction of the new culvert, which necesitated the construction of this excavation at the side of the road, I think defendants might perhaps have been liable in law, if during the night-time, the injury had been caused in consequence of no proper indication by lights or otherwise of the presence of the excavation; but that is not the present case. The injury in the present case was either the result of pure accident, or the negligence of Ford and his servants in placing the cement casks at the side of the road. The unprotected excavation cannot be blamed. The plaintiff was hurt because he had lost control of his scared horse, and had there been instead of an excavation, a lamp-post against which he feared to be dashed, the lamp-post could not be said to be the cause of the hurt, if plaintiff had jumped to avoid it. Either the horse was to blame for shying and bolting unreasonably, or those who by unreasonable conduct caused the

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horse to shy. In coming to the conclusion that blame cannot be attributed to the excavation, I would refer to the following cases, as shewing that the damage should only be attributed to a defect in the horse or the presence of the casks. In *Scott* v. *Shepperd*, one of Smith's leading cases, defendant threw a lighted squib into a crowd. It fell upon one Yates, who to prevent injury to himself and wares, threw it across the market-house, where it fell upon the stand of one Ryall, who threw it to another part of the market, where it struck plaintiff. It was held that defendant, who started the squib, was liable in trespass, and although the case was a leading one principally to shew the difference between case and trespass, there was never any question of liability in defendant as being the proximate cause of the injury. Also in *Bailiffs of Rumsey Marsh* vs. *Trinity House*, where a ship becoming unmanageable through the neglect of the Captain three-quarters of a mile from the lee shore, drifted ashore, and damaged the plaintiffs' seawall, it was held that the neglect of the Captain was the proximate cause of damage. Again, in the case of *Lawrance* vs. *Jenkins*, 8 Q. B. D., 274, and the case of *Sneezeby* vs. *Lan. and York Railway Co.* 1 Q. B. D., 42, where defendant Company was held liable for the consequence of their servant's act, in negligently sending some empty trucks down an incline into a siding, which frightened a herd of cattle travelling along a road, and which cattle were afterwards killed on another part of the railway,—this was held to be the natural consequence of the negligent act of the Company's servant. Again in the case of *The Sisters* 1 P. D. 117, where a vessel by improper navigation compelled another to alter her course, and in so altering it she came into collision with a third, the first ship was held liable to the third for the damage caused. There are also the cases of *Clarke* v. *Chambers*, 3 Q. B. D. 327, and *Harris* v. *Mobbs* decided in the Common Pleas Division, 1878, where defendant had left a van with ploughing gear on the grassy side of the road to stand there for the night. The deceased drove by along the road, and his mare, who it appeared in evidence was a confirmed kicker, shied at the thing and then kicked and ran away, upsetting the deceased and kicking him, so that he died; it was held that the act of Mobbs in leaving the van was an unreasonable user of the highway,

and that the death was the proximate and natural result. I quote these cases not so much to shew that Ford was liable, as to illustrate the reasonableness of defendants' contention that the excavation cannot be blamed as the legally proximate cause of the hurt. It is not necessary for me to determine that Ford is liable. He is not before the Court, and that alone should be a sufficient reason for not expressing an opinion on his liability, unless it were absolutely necessary to do so for the purpose of this case. Certainly the case of *Walters* v. *Lucas*, 7 Juta, 153, is in many respects similar to the present one, and there the Supreme Court held that the hurt was caused by placing two bundles of wood on a highway, which caused a horse to shy and injure plaintiff, but did not give a right of action, the hurt being attributed to accident and not neglect. In that case the servant of defendant had placed a bundle of wood at the side of a road only six yards wide and in a place which he himself thought dangerous (at that sharp turn) to horses suddenly coming up to it. This was the opinion of another man who passed the spot, and defendant himself on hearing what his servant had done, said: "You stupid, could you not find another spot?" Notwithstanding all this the Chief Justice supported the judgment of the Magistrate, that plaintiff's horse taking fright at the bundle and upsetting plaintiff's cart did not entitle him to damages, saying that the man who placed the bundle there "could not be reasonably expected to have foreseen that a pair of horses would take fright at it." It is impossible not to sympathise deeply with the plaintiff, and I do not express an opinion commending the manner in which the excavation was left open, but for the reasons already given, I am forced to the conclusion that the defendants are not in law responsible for the damage caused to plaintiff. There must be judgment for defendant with costs. I may add that between the case of *Murray* v. *East London Municipality* and the present one there is no analogy, and that, although I did not take part in that judgment, I concur in the conclusion and reasons for that decision.*

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* [The judgment in *Newman* vs. *Town Council of East London* was reversed on appeal to the Supreme Court, March, 1895, and a verdict entered for plaintiff.]

KAPLAN *vs.* ABRAHAMSON.

Malicious Prosecution—Malice—Reasonable and Probable Cause.

When K. was arrested and put on trial for theft on an affidavit made by A., some of the statements in which were based on a story told to A. by his native servant, which story was incorrect in details and possibly untrue, and K. being discharged brought an action against A. for malicious prosecution. Held, *that A.'s conduct in believing the story and making the affidavit did not show a recklessness amounting to the malice necessary to support an action for malicious prosecution.*

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Kaplan *vs.* Abrahamson.

This was an action for £1000 damages for malicious prosecution. The plaintiff's declaration stated that he is a hawker trading in Somerset East and the neighbourhood; that on June 12, 1894, the defendant, who is a farmer in that district, wrongfully, maliciously, and without reasonable or probable cause, laid a sworn information against the plaintiff on a charge of theft, and that the plaintiff was apprehended and lodged in gaol till June 19th, when the Resident Magistrate of Somerset East held a preliminary examination and discharged the prisoner, whereby the prosecution terminated; that the plaintiff was at the time a merchant, and that his goods were on the occasion of his arrest brought into Somerset East and detained, and were injured thereby; and that the plaintiff was injured in reputation, suffered much inconvenience and mental distress, and loss in his trade and business, for which he claimed damages to the amount of £1000.

The defendant's plea admitted the making of the affidavit, and affirmed that he had reasonable and probable cause for laying the charge referred to.

From the evidence it appeared that the plaintiff, who had an ordinary hawker's licence, was prosecuted at Somerset East, on June 9 for purchasing ostrich feathers without a licence; about 7 lbs. of feathers found in his possession were produced in Court, and were weighed and examined by experts, and differed from an ordinary farmer's plucking in that they were cut very short. The accused admitted the

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charge, stating that he had received the feathers from Christoffel Botha, a farmer in the district, in payment for goods. He was fined £50, paid the fine, and receiving the feathers again, went out to stay at the farm of one Fronemann near Somerset East. Before this time, at the end of May, 1894, Mr. Isidore Abrahamson, the defendant, who was acting as superintendent of the farm Perdefontein for his brother, discovered that feathers had been stolen from about forty ostriches belonging to his brother on this farm. These birds had had their alternate feathers clipped off, and like the feathers produced in Court in Kaplan's case, the missing feathers, which were of the second plucking, had been cut off very short: the farm Perdefontein was in charge of one Welken, Mr. Abrahamson only visiting it occasionally. On hearing of the feathers produced by Kaplan the defendant's suspicions were aroused, and he instructed a detective to watch Kaplan. This detective reported on June 11 that Welken had visited Kaplan on the farm he had retired to, and that a native servant, Charlie, stated that some two months previously Kaplan had been at the farm Perdefontein; also that Welken had at the detective's request signed an affidavit which stated that feathers had been stolen from the farm Perdefontein, and that Kaplan had been buying feathers in the neighbourhood, and concluded with an application for a search-warrant against Kaplan, but when brought before the Magistrate's clerk to swear to this affidavit Welken had refused to do so. On hearing these facts defendant had a consultation with his solicitor in the presence of the Acting Magistrate, and as the result thereof, made an affidavit applying for a search-warrant against Kaplan. The affidavit stated that about seven weeks ago the feathers of about forty ostriches were stolen from the farm Perdefontein, under circumstances which shewed that the theft must have been deliberate, that the defendant had been informed and believed that one Kaplan, lately convicted of buying feathers without a licence, had in his possession feathers exactly resembling those stolen, and as he was buying feathers in the neighbourhood of the farm there was reasonable ground for believing that these feathers were the ones stolen. On this affidavit a search-warrant was issued, containing the usual alternative warrant to arrest, and Kaplan was forthwith

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arrested, and brought to Somerset East on June 12 and charged with theft; about 7 lbs. of ostrich feathers were again found in his possession. Welken was also arrested on the same charge, although defendant admitted that at no time did he think him guilty. The two accused were tried together before the Acting Magistrate of Somerset East, defendant appearing by his attorney to prosecute. The defence was that these were the same feathers on which the previous charge of illicit feather buying had been founded, and that they had been bought from Christoffel Botha. Botha identified them as sold by him, stating they were the third plucking. For the prosecution evidence was led that though this lot of feathers were similar to the other lot, and tallied in weight to within a quarter of an ounce, yet they differed considerably in the way the weight was made up. The first lot contained 2 lb. 2½ oz. of drab feathers, the second lot 2 lb. 11 oz.; the first lot 2 lb. ½ oz. of wing feathers, the second only 1 lb. 12 oz.; also some of the feathers appeared to be second plucking. On this evidence the Magistrate discharged the accused; and the accused now brought an action for malicious prosecution.

Besides the above evidence, Welken denied ever having had any communication with Kaplan, and stated that he would not swear to the affidavit as he feared it might get him into trouble; and the native Charlie failed to point out the exact time in which Kaplan had been on the farm Perdefontein.

Maasdorp, S.-G. (for plaintiff). Plaintiff has to prove both want of reasonable and probable cause and also malice; this is not actual malice of mind, but legal malice, *i.e.*, from want of reasonable cause the Court may infer malice, and not making proper inquiries or exercising due caution is proof of it (*Cunningham and Matheson's Precedents in Pleading*, 426).

The charge practically laid was that Welken stole the feathers, and Kaplan received them from him; yet defendant admits that he at no time suspected Welken.

[*Per* BARRY, J.P.: The affidavit in question does not implicate Welken.]

At all events the defendant appeared in Court to prosecute Welken, and the whole charge a ainst Kaplan rests on

his being guilty. Before making affidavit defendant should have inquired from Botha if the feathers had been bought from him as alleged.

Sampson (for defendant) was not called upon.

BARRY, J.P.: In order to succeed in this case the plaintiff must shew, firstly, a want of reasonable and probable cause on the part of the defendant in making the affidavit and bringing about his arrest, and secondly, that this was done maliciously. Malice in this sense does not mean spite or ill-will, to establish it it is sufficient to shew that the defendant acted recklessly in doing what he did. Now the evidence of the defendant, whom we believe in every word that he has stated, shews that feathers of between thirty and forty ostriches on his brother's farm were stolen at a time when his brother was absent, and he held a power of attorney for him, and was acting on his behalf; they were stolen, too, in a manner which would induce every farmer to be anxious to effect the conviction of the offender. It was defendant's duty, both to his brother and to the public, to get to the bottom of the facts connected with this theft. He heard the facts as stated by the detective, and even then would not swear to the affidavit at once, as the detective wished, but insisted on consulting his attorney first. His attorney told him that the facts justified him in making this affidavit, and told him so in the presence of the Acting Resident Magistrate, who did not say anything in opposition or remonstrance: on this he made the affidavit. No statement made in the affidavit has been shewn to have been made recklessly or even to be untrue. The native Charlie may perhaps have been incorrect as to the time at which Kaplan's visit to Welken's farm took place, but it is not surprising that the detective believed him, particularly after Welken's conduct in the matter of the affidavit. The part of the affidavit based on the statement of this native, though the statement is probably incorrect in details, and possibly untrue, does not prove that the defendant was reckless in believing him. Consequently, there is nothing in the affidavit to bring me to the conclusion that the defendant in making it acted with a recklessness which amounts to malice. As both malice and want of reasonable and

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probable cause must be proved, and as there is no proof of the former, the plaintiff must fail in his action.

I go, however, a step farther, and I am not prepared to say that there was a want of reasonable and probable cause. There were very suspicious circumstances against both Kaplan and Welken, although defendant refused to believe anything against his old servant Welken. If I had been trying the case these circumstances would have raised serious doubts in my mind about their innocence. If there was evidence to shew that the feathers in Kaplan's possession were stolen feathers, then there was certainly reasonable and probable cause for taking action. The evidence of the experts as to the nature of the feathers and the way in which they were cut does go to prove that these feathers were not an ordinary farmer's plucking. Consequently, however the case is regarded, the plaintiff cannot succeed, and he should not be surprised at this, as when he bought the feathers originally he did so without a licence; this fact alone would, in my mind create suspicion.

JONES, J.: I fully concur; I have only to add that I am not convinced that the Resident Magistrate acted rightly in dismissing the charge against Kaplan at the time he did. He did so somewhat summarily, and I am by no means satisfied with Botha's evidence, on which the discharge was given.

QUEEN *vs.* LYNCH.

Act 35 *of* 1893, *s.* 28—*Theft—Ostrich Feathers.*

Where a prisoner accused of theft of produce under s. 28, *Act* 35 *of* 1893, *stated that he had received the ostrich feathers in question from H. P. of Humansdorp, and there was some evidence that there was one H. P. residing at Humansdorp, but none as to whether he owned ostriches or not, and H. P. was not produced for the defence.* Held, *that the accused had not given a satisfactory account of his possession of the feathers.*

1894. Dec. 4. Queen *vs.* Lynch.

Review of a decision of the Resident Magistrate of Port Elizabeth.

[1894. Dec. 4. — Queen vs. Lynch.]

Nicholas Lynch was charged with the crime of theft of produce under the provisions of s. 28, Act 35 of 1893, in that he had wrongfully and unlawfully stolen about 100 lbs. of ostrich feathers, the property of some person unknown. From the evidence it appeared that Lynch, who was a feather sorter by trade, had, on five or six occasions between May and October, 1894, brought parcels of feathers, amounting in all to 123 lbs., to Messrs. Milton, Watson & Co. to sell for him on the market. He told them that the feathers belonged to one Potgieter of Humansdorp, that he sorted them for him, and handed him over the purchase-money they fetched, after deducting his own fee for sorting. One of the parcels was produced in Court, and did not appear to be an ordinary farmer's plucking, as it contained too large a proportion of black feathers. There were several Potgieters living in Humansdorp, one of whom appeared to be called Hans Potgieter; there was no evidence as to whether he kept ostriches or not, and the Chief Constable of Humansdorp stated that no farmer's plucking in the district would amount to 123 lbs. in the year. For the defence, accused stated that all the feathers handed by him to Messrs. Milton and Watson were brought to him by Hans Potgieter of Humansdorp. He had never taken down the full name or address, nor had he got any receipts from him for the purchase-money which he returned to him. Potgieter had given him feathers on five or six occasions, sometimes bringing them himself in his waggon, sometimes sending them by a native servant. S. 28, Act 35 of 1893, provides—

> If there be reasonable grounds for believing that any person is or has been in unlawful possession of any stock or produce, it shall be competent for any justice of the peace, &c., to apprehend or cause to be apprehended such person without warrant, and to convey him or cause him to be conveyed in custody before any resident magistrate having jurisdiction, and if it be found that he is or has been in possession of any such stock or produce, and is not able to give a satisfactory account of such possession to such magistrate, he shall be deemed to be guilty of the crime of theft of stock or produce, and shall thereupon be dealt with as if he had originally been charged with such crime.

The accused was found guilty.

Burke, for appellant: Under s. 28 the onus is thrown on the Crown of proving that the prisoner's possession was an

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unlawful one, and there is no evidence of this. ' Unlawful possession and theft are both necessary to constitute the presumption under the section.

Maasdorp, for the Crown, was not called upon.

BARRY, J.P.: The Magistrate's finding is amply justified by the evidence. The fact of the man from whom the prisoner alleges he got parcels of feathers on several occasions not being produced is enough to justify the magistrate in holding that no satisfactory account of the possession of the feathers has been given. The conviction will be confirmed.

JONES, J. concurred.

QUEEN *vs.* OPENSHAW AND HAYES.

Act 5 *of* 1879—*Evidence—Review.*

Where an accused on his trial before a Magistrate tenders evidence that is legally inadmissible, and the Magistrate not merely admits it, but also, in his reasons for finding the accused guilty, bases his judgment in part on this illegal evidence, and on reports made to him which are not in evidence at all, the Court (taking into consideration the provisions of Act 5 *of* 1879) *will not disturb the finding if there is other legal evidence which could have led the Magistrate to the same conclusion.*

1894. Dec. 11. — Queen vs. Openshaw and Hayes.

Appeal from a decision of the Resident Magistrate of Bathurst.

Richard Openshaw and Walter Hayes were charged with contravening s. 5, Act 36 of 1886, in that upon or about the 1st November, 1894, at Bathurst, they, or one of them, did wrongfully and unlawfully kill, pursue, shoot, or have in their possession a certain game animal, one buck, in the close season.

For the prosecution two native policemen, Landu and Sezani, gave evidence that on the 1st November, 1894, they were sent to watch the house of Mr. George Hodginson to see if any game was brought there. Just before sundown

they saw four men come to the house, two of them carrying a buck and the other two carrying two guns each. The men carrying the buck hung it up on a tree in front of the house and went inside, and the policemen examined the buck and saw that it was a duiker: subsequently two of the four men left the house. Both policemen were confident that Openshaw and Hayes were two of the party, and that the other two were sons of George Hodginson, but they could not say which sons; Landu also said that Openshaw and a Hodginson were carrying the buck, while Sezani said that Openshaw was carrying two guns, the buck being carried by two of the Hodginsons.

For the defence a criminal record was put in of a case in which the four sons of Mr. Hodginson had been tried and acquitted for the same offence arising out of the same facts. In that case Sergeant Arnold (who was not called by either side in the present case) gave evidence that on the 1st November about 5 o'clock he saw two men, whom he recognised as Hodginsons, on the Bathurst Commonage with what appeared to be guns in their hands, and soon after heard two shots. He immediately went back to camp and ordered Landu and Sezani to watch Mr. Hodginson's house, and they reported to him that evening that four Hodginsons had gone up to the house with a buck.

The accused Openshaw gave evidence that on the 1st November he was working on his lands till 5.30 in the evening with Harry Hodginson (one of the four previously acquitted), who was in his employment. They stopped work at that hour and went to take a swarm of bees they had noticed at a place about two miles from Openshaw's farm. They placed the bees in a grain-bag, and returning stopped on their way at George Hodginson's house, where accused left his grain-bag on a fence in front of the house and went in to get a drink of water. They were accompanied to the house by Hayes, whom they met as they returned looking for some of his oxen which had strayed; none of them had guns with them. Shortly afterwards Openshaw and Hayes left the house together. Hayes, Harry Hodginson, George Hodginson, and another witness gave evidence to the same effect, all stating it was a grain-bag and not a buck that Openshaw brought to the house.

The Magistrate found the two accused guilty. In his

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reasons he stated: "I have believed the evidence given by the Police in preference to that of the interested accused and the r friends. It has often been reported to me that poaching is being constantly carried on in Bathurst, and I am sorry to say the inhabitants bear a bad character as regards speaking the truth. Sergeant Arnold states in his evidence in the case *Q.* vs. *Four Hodginsons* (put in as evidence in this case) that he was near the bush in the evening, saw four men carrying what looked like guns. . . ." (Here followed a summary of the evidence of Sergeant Arnold and the other evidence as given above.)

King (for appellant): The Magistrate was clearly wrong in admitting the evidence of Arnold taken in a previous case; his admitting it is not enough to invalidate his decision, but his relying on it to form his conclusion is. Even if there is sufficient other evidence to support the conviction, the Magistrate in believing it instead of the evidence for the defence was influenced by the illegal evidence of Arnold and the reports he referred to. He does not even quote Arnold correctly, in the case of the four Hodginsons Arnold swore he saw two Hodginsons on the commonage, and says nothing of four men, as stated in the Magistrate's reasons.

Apart from the improper admission of evidence, the policemen's evidence was contradictory, and should not have been believed. Arnold says they reported that four Hodginsons brought the buck to George Hodginson's house; they cannot now agree as to who carried the buck, or as to which of the four men they identified.

Maasdorp, S.-G. (for Crown): If all the improper evidence be removed from the Magistrate's reasons, there still remains the fact that he believed the two policemen; this is sufficient to justify the conviction.

BARRY, J.P.: I think the Magistrate will regret the general remark which he has included in his reasons in this case, both because there is nothing to shew that it is correct, and because it is not surprising that a strong argument has been founded on it to shew that he was wrong in his decision. I am not surprised at this, and would not be surprised if this general remark, together with his having imported Arnold's evidence into his reasons, would lead any one to the conclu-

sion that in inferring that the two witnesses for the prosecution were credible, the Magistrate reached this inference through his prejudice against the inhabitants of Bathurst and a bias adopted partly from the illegal evidence of Arnold. If we do dismiss all the illegal evidence, there remains that of Landu and Sezani, who, as has been argued, went out to discover an illegal transaction, and did discover one; they did this, however, in the course of their duty, and there is nothing to shew that they did their duty improperly. It is said that their evidence is contradictory, but from the very first, at the trial of the four Hodginsons who were acquitted, they agreed in saying that Openshaw and Hayes were of the party, and this story they have adhered to all through. One indeed says that Openshaw was carrying two guns, the other that he was carrying the buck, but this goes to shew that they did not come into Court with a pre-concerted story meant to deceive. On their evidence I would have come to the conclusion that they are to be believed, and consequently that the conviction must stand, although the Magistrate may have imported into the case circumstances which ought not to have been so imported. The appeal will be dismissed.

JONES, J.: I concur, and have only to add that before 1879 I might have had some doubt about coming to this conclusion. S. 27, Act 5 of 1879, provides that no conviction shall be set aside because evidence was improperly admitted or rejected, by which no substantial wrong was, in the opinion of the Court of Appeal, done to the defendant. In consequence of this we can give no effect to Mr. King's argument. The defendant produced this evidence himself, and now wishes to take advantage of this.

MAASDORP, J., concurred.

Bock *vs.* Schroeder and Land.

Nuisance—Noise—Skittle-alley—Interdict.

Where in a street in King Williamstown, which is mainly occupied by private residences, but contains a blacksmith's shop and a hotel, defendants erected a skittle-alley in connection with the hotel, and the game of skittles was played there at night with considerable noise caused by the sound of the balls against the wooden floors and sides, and by the cries of the players and markers. Held, *that this constituted a nuisance, and that the defendants were liable in damages, but that an interdict should be refused, as the game could be played in such a manner as not to amount to a nuisance.*

Where a tenant allows a nuisance to exist on premises of which he is in occupation, the landlord, as well as the tenant, will be liable in damages, if by his conduct he supports the tenant in maintaining the nuisance.

1894.
Nov. 22,
„ 23
Dec. 14.

Bock vs. Schroeder and Land.

This was an action for £500 damages, and for an interdict restraining the defendant from allowing the game of skittles to be played on his premises in such a manner as to interfere with the plaintiff in the enjoyment of his premises.

The declaration stated that the plaintiff was and is the owner of Lot 15 in Block T, a quiet place in Leopold Street, King Williamstown, and also of Lot 19 and 21 of the same block; that the defendants are respectively the owner and occupier of Lots 16 and 18, adjoining plaintiff's premises in 15, and near to 19 and 21; that the first defendant by himself or his tenant Meine unlawfully and wrongfully erected a skittle-ground on his premises in Lot 16, and in June, 1894, hired it out to the second defendant, who is now in occupation of the same; that by the invitation and permission of the defendants and for reward this skittle-ground is occupied by crowds of noisy, loud, and disorderly persons, and the game of skittles is played there with loud and battering sounds, and that the plaintiff by himself and his tenants is thereby disturbed and incommoded in the enjoyment of his premises, and has suffered damages to the extent of £500.

The defendants in their plea admitted the ownership and occupation of the premises in question and the erection of the skittle-ground, but said that this was lawful and within defendants' rights, and that it was lawful to allow the game of skittles to be played there, and that there was no more noise than is usual when that game is played. They also claimed in re-convention £20 damages owing to the conduct of the plaintiff in trying to prevent the game being played by deluging the ground with water; plaintiff admitted having turned his garden hose on the alley, and tendered £3, which he maintained was sufficient as damages.

From the evidence it appeared that in 1879 plaintiff purchased lots 15 and 19 in Leopold Street, King Williamstown, and built a house on No. 15, which he occupied till 1892, when he moved into a house on No. 19 lower down the same street, and let the house on 15 to various successive tenants. Lot 15 stands back to back with 16 and 18, which are adjoining lots. In 1879 there was a hotel on No. 18, but no skittle-alley anywhere. In 1881 Schroeder, who owned the hotel and lots 16 and 18, built a skittle-alley on 16, having first consulted various residents, including the plaintiff, and found that they had no objection; skittles were occasionally played here, but the alley fell into disuse before 1891. In April, 1891, one Meine became tenant of the hotel, and had the skittle-alley reconstructed. The alley, as reconstructed, consisted of a wooden floor resting on cross pieces of timber bolted on uprights of trellis-work about 15 inches from the ground; it was about 60 ft. long, by 6 or 7 wide, had sides of wood, and a centre-board about an inch higher than the rest of the floor At the top end was a structure of wood and galvanized iron, where the skittles stood, to protect the markers who put up the skittles. There was the usual trough, down which the balls were returned and fell into a wooden box at the end. There was some evidence that to prevent the ball striking against the iron sides of the structure at the top, the inside was lined with wood and bags of straw placed against this wood. This structure at the end of the alley was 1½ or 2 feet from a wooden fence forming the boundary at the back of No. 15. During Meine's occupation of the hotel, which lasted till March, 1894, skittles were constantly played there, gene-

1894. Nov. 23. „ 28. Dec. 14.

Book vs. Schroeder and Land.

rally in the evening ending about 10.30. In April, 1894, the hotel was let to Land, and skittles continued to be played with, as plaintiff said, increased noise, and sometimes till almost 11 o'clock. This went on till 14th July, when matters were brought to a crisis by plaintiff, after having ineffectually complained of the noise, turning the garden hose of No. 15 on the ground and players, at about 10 or 10.30 at night. A great deal of evidence was led as to the inconvenience caused by the game; the noises complained of were the rumbling and the crashing of the ball from the time it left the hand, the falling of the skittles, and the crash the ball made as rolling down the trough it fell into the box; also by the markers re-placing the skittles and calling out the score, and occasional shouts and songs from the players. Various tenants of No. 15 gave evidence that while the game was being played they were obliged to keep all their doors and windows shut to deaden the sound, and even so were sometimes prevented from sleeping by it, and that it was impossible to sit with comfort on the back storp. The noise however did not seem to be the cause of any of them giving up the house. The plaintiff who lived in No. 19, and other residents of the street gave evidence that even there the noise was a disturbance, and tended to depreciate the value of property there. The street is at some distance from the business part of King Williamstown, and is mainly occupied by private residences; there is however, a blacksmith's shop directly opposite No. 15, and a butcher's shop farther down in the same street.

Maasdorp, S.-G. (for plaintiff), maintained that a nuisance had been proved to exist which materially interfered with the ordinary comfort of existence to the neighbourhood. He referred to the general statement of the law as quoted in *Holland* vs. *Seott*, 2 E. D. C. p. 318, and to the cases relied on there; more particularly *R.* vs. *Smith*, p. 313; *Broder* vs. *Saillard*, p. 315; *Sturgess* vs. *Wimpole*, p. 316; *Walker* vs. *Brewster*, p. 323.

Du Toit vs. *De Bot*, 2 Jut. 213, was distinguished, as there the neighbourhood was a manufacturing one, and the plaintiff himself carried on a manufacture there. In *Barham* vs. *Hodges* ('Weekly Notes' 31, of 1876, 29th July) referred to in *Kerr on Injunctions*, p. 207, an interlocutory order was

granted restraining the playing of skittles on a ground 6 feet from applicant's garden.

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Sampson (for defendant): *Du Toit* vs. *De Bot*, was directly in point; it turned on the fact that only personal discomfort and not material injury to property had been proved, as was the case here; here, too, the neighbourhood was partly a manufacturing one. In *Holland* vs. *Scott*, the evidence shewed an absolutely quiet neighbourhood, and that the noise complained of took place a few feet from plaintiff's bedroom. It must be remembered that this alley had existed for fourteen years, and that none of the neighbours had complained.

Posteà (Dec. 14).

BARRY, J.P. The question in this case is whether the manner in which the game of skittles was played on the defendants' premises on the occasion complained of in July last constituted what is known in law as a nuisance. That a nuisance can be caused by sound is sufficiently shewn by the English cases quoted in *Holland* vs. *Scott*, so I will not go at length into the subject. The question to be considered is whether the sound and noise have interfered with the ordinary comfort of life to those dwelling in the neighbourhood. This depends on many things; partly on the nature of the place, as in a busy manufacturing neighbourhood it would be unreasonable to expect the same freedom from disturbance as in a retired spot, far from the din of a city; the time too is important, extraordinary sounds late at night and early in the morning might be a nuisance, although they would not be so at a different time of day. A certain difficulty arises in this case from two circumstances. Firstly, that the game has been played on these premises for many years; secondly, because there is in the neighbourhood a blacksmith's shop. I think, however, notwithstanding these circumstances, that the game as played on the night in question did interfere with the ordinary comfort which the plaintiff had a right to enjoy, and that he is therefore entitled to damages. That the tenant in occupation of the premises is liable there is no doubt, that the landlord would not in every case be liable is equally apparent. In this case in holding the landlord liable I am influenced by two

1894. Nov. 22. „ 23. Dec. 14.

Book *vs* Schroeder and Land.

reasons; at the time the letting of the house took place there is evidence that the game of skittles used to be played there, and the landlord's conduct was such as to shew that he supported the tenant in what he did. Damages will accordingly be given against both, but no interdict will be granted, as the nuisance depends on the manner in which the game is played, and it is evident that it can be played much more quietly; the damages will be nominal, as notwithstanding the long period during which the game has been played, this is the first time that a formal complaint about it has been made.

Judgment for plaintiff for forty shillings, and for defendants in re-convention for £3 amount of tender; defendants to pay costs both in convention and re-convention.

JONES and MAASDORP, J.J., concurred.

BOURNE *vs.* BOURNE.

Judicial separation—Evidence.

When a wife claimed a decree of judicial separation on the ground of cruelty and ill-treatment on the part of her husband, and a consent paper, agreeing to terms of separation, was filed by the parties, the Court granted a decree of judicial separation, without hearing any evidence of cruelty.

1894. Dec. 19.

Bourne *vs.* Bourne.

This was an action brought by M. T. Bourne against her husband for judicial separation, division of the joint estate, and custody of the children of the marriage; the grounds alleged were cruelty and continued ill-treatment by the husband.

A consent paper was filed agreeing, *inter alia*, that plaintiff should have the custody of the three youngest, and defendant of the two eldest children; that the defendant should have the sole control of the joint property during his life, and should pay to plaintiff a fixed sum monthly, passing a mortgage on certain property to secure the payment of this.

Sampson (for plaintiff) pointed out that evidence, sufficient to warrant a decree of judicial separation, had already been afforded to the Court on affidavit, in an application for an order on defendant to supply funds to enable plaintiff to take this action. 1894. Dec. 19. — Bourne vs. Bourne.

[*Per* JONES, J. But those affidavits were not read, they were only referred to, and an order was granted by consent.]

Maasdorp, S.-G., appeared to consent.

A decree of judicial separation in terms of the consent paper was granted accordingly.

Re DIXON & Co.; *Ex parte* GOODYER.

Bank—Agreement—Money paid for Specific Purpose—Jurisdiction.

Where money was lodged in a bank for the purpose of being remitted to England and the bank, having a claim against the firm lodging it, subsequently refused to remit it, and retained it in their own hands; an application to order them to refund it was not granted, there being no evidence of any urgency or peril in its remaining in the bank.

Where an order had been made the day before in the Supreme Court in reference to a certain subject-matter, the E. D. Court refused to make an order with respect to the same subject-matter, as it was not shewn fully what this order was, and whether it was such as to make the Supreme Court ultimate arbitrator in the matter.

Application for an order compelling the African Banking Corporation to carry out an agreement made between applicants and J. A. Cooper, Manager of the African Banking Corporation at Port Elizabeth, whereby he agreed to remit £4400 by cablegram to England, or otherwise to compel them to refund said sum, together with any balance of the liquidation account of A. Dixon & Co. 1895. Jan. 12. — *Re* Dixon & Co.

The petition of the applicants, Messrs. Goodyer & Smith, set forth that they had been appointed receivers of the estate of A. Dixon & Co. in liquidation by Mr. Justice Stirling in England, and that this appointment had been

1895. Jan. 12. — *Re* Dixon & Co.

confirmed by an order of the E. D. Court, to which order the African Banking Corporation, the respondents, who were creditors, consented. Amongst the creditors of the firm are debenture-holders to the amount of £19,000, registered in England and also here. Petitioners have before this remitted to them £3800 through the respondents' bank. On the 7th January petitioners asked J. A. Cooper, respondents' manager at Port Elizabeth, to remit a further sum of £4400 by cablegram to the representatives of the debenture-holders. He at first objected on the score of the expense involved, but on January 8th agreed to remit the sum next day; a cheque and application form were accordingly made out by petitioners, and money paid into the bank to meet the cheque. Next day, however, Cooper refused to remit, and petitioners said they would withdraw their balance, amounting to £4600, and drew a cheque for that amount. This cheque was dishonoured, the explanation given being, "Not sufficient funds; bank has counter-claim." The respondents have no preferent claim in the estate, and the estate, it was stated, would be prejudiced by every hour's delay in the remittance.

For respondents there was an affidavit setting forth a telegram from the respondents' manager at Cape Town, which stated that on January 11th an order had been obtained from the Supreme Court restraining the receivers of Dixon & Co. from sending any money out of the country.

Maasdorp, S.-G. (for applicants): On account of the order in the Supreme Court, we cannot ask that the agreement to remit should be carried out, but we do ask for an order compelling respondents to refund the money, and are willing that it should be lodged in the hands of the Registrar till action taken. This money was lodged on the understanding that it should be remitted, and the bank cannot set up a counter-claim against a trust fund; besides, they have no preferent claim. Their conduct amounts to a fraud, and we consider there is peril in the money remaining in their hands. The order of the Supreme Court only refers to sending the money out of the country, and this order would not involve any conflict.

Blaine (for respondents): From applicants' affidavit it appears that we have asserted a counter-claim against this

money, and till this is decided it should remain in our hands. The matter has now come before the Supreme Court, and on the return day of the order the applicants will have an opportunity of making any claim; no reason for urgency has been given.

BARRY, J.P.: The affidavits do not shew any peril or urgency, or any reason why this sum should not stand for a few hours or days longer in the hands of the bank; consequently there is no reason for granting the application. The matter, too, may be before the Supreme Court in such a manner as to make it the ultimate arbitrator, in which case we cannot deal with it; we ought to know what order exactly the Supreme Court has made. The application will stand over *sine die*.

JONES, J., concurred.

MAGISTRATES' CASES REVIEWED.

QUEEN *vs.* KLEIN BOOI AND DAVID TONDONISO.

Special Justice of Peace—Jurisdiction.

1894. Dec. 1. — Queen vs. Klein Booi and David Tondoniso.

Mr. Justice Jones mentioned this case, which came for review from the S.J.P., Barkly East. The prisoners were charged with theft under s. 2 of Act 19 of 1884, and found guilty and sentenced, the former to pay a fine of 10*s.* or 15 days' hard labour, and the latter to a fine of 15*s.* or 20 days' hard labour. This Act, however, has been repealed by Act 35 of 1893; and the 28th and 29th sections of the Act of 1893 do not confer any jurisdiction upon a S.J.P. to try cases of this kind, and his power to punish is too limited for these cases. The S.J.P. should have sent the case to the R.M.

The Court ordered all proceedings to be quashed, as the S.J.P. had no jurisdiction in this case.

QUEEN *vs.* PATIMA.

Act 23 *of* 1879, *s.* 4—*Vagrancy.*

1894. Dec. 3. — Queen vs. Patima.

The Judge-President mentioned this case, which came for revision from the R.M. at Albert. The prisoner was charged with having wrongfully and unlawfully been found in the middle of a herd of sheep at 12 o'clock at night, the property, or in the lawful possession of Joseph Hemming, a farmer residing at Hemming's Krantz. The accused was found guilty and sentenced to 12 months' imprisonment with hard labour. A person who is wrongfully found in a farm which is enclosed may be convicted; but the evidence

shewed that the farm in question was not enclosed. He might, if there were evidence, be convicted of an attempt to steal.

1894. Dec. 3. Queen vs. Patima.

The Court ordered that the proceedings be quashed, and all subsequent proceedings, including the conviction and sentence. This would not prevent the accused being tried upon a proper charge.

QUEEN *vs.* SIKIWE.

Act 4 *of* 1883, *s.* 45—*Small-Pox—Penalty.*

The Judge-President also mentioned this case, which came for review from the R.M. at Victoria East. The accused was charged with contravening s. 45 of Act 4 of 1883, in neglecting to give notice to the Divisional Council that two of his children were suffering from small-pox, and was sentenced to pay a fine of £5, or, in default of payment after service of writ, to go to prison with hard labour for a period of three months. The section does not, however, give any power to imprison, and there was nothing to shew that the Magistrate was acting under the ordinance of 1856 and that the prisoner had not sufficient goods on which to levy the fine.

1894. Dec. 3. Queen vs. Sikiwe.

The Court ordered that the alternative of three months' imprisonment be struck out of the sentence.

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Q. *vs.* VAN DER SCHAFFE.

Magistrate's Court—Periodical Court—Irregularity—Review.

When a Magistrate commenced the hearing of a criminal case at a Periodical Court in his own district, and then removed the case to the Magistrate's Court of the district, where on a subsequent day he took the evidence of a further witness and convicted the accused. Held, *that this removal from a Periodical to a Magistrate's Court was illegal, and that the conviction must be quashed.*

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Queen *vs.* Van der Schaffe.

Review of a decision of the Resident Magistrate of Humansdorp.

The appellant was charged with contravening sect. 75, Act 28 of 1883, in that on or about the 19th October, 1894, he sold to one William C. Macgregor intoxicating liquor, namely, one bottle of sherry, without a licence; and that on or about the 22nd October he sold to the same William C. Macgregor intoxicating liquor, one-half bottle of Cape

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brandy without a licence. He was found guilty on both counts, and fined £25, or in default three months' hard labour.

The ground of review was irregularity of proceeding on the part of the Magistrate.

From the record and an affidavit of appellant it appeared that the accused was summoned and appeared on the 22nd December before the Periodical Court of Storms River, in the district of Humansdorp, held by the Resident Magistrate of Humansdorp. Then evidence both for the prosecution and defence was heard, the principal witness for the prosecution being W. C. Macgregor, a trap. The Magistrate then postponed the case and removed it to the Magistrate's Court at Humansdorp, where it was resumed on the 31st December before the same Magistrate, and the evidence of an additional witness for the prosecution, Macgregor's wife, who was present at the alleged sale, was called, and the prisoner was found guilty, and sentence was passed.

Blaine (for appellant): Act 9 of 1857 shows that the Periodical Court is quite distinct from the Magistrate's Court of the district, and a Magistrate has no power to remove a case from one to the other; even the Superior or Circuit Courts cannot do so after evidence heard. As by sect. 2, Act 6 of 1858, a Resident Magistrate may hold a Periodical Court outside his own district, if this removal were sanctioned, the anomaly might arise of a Magistrate removing a case to his own Court, which had no jurisdiction.

Besides this the Magistrate was wrong in calling additional evidence after the case for the defence had closed. *Q.* vs. *Plessis & Badenhurst* (*Cape Times*, August 29, 1894). This objection is perhaps not fatal, as the present case is distinguished from that quoted by the fact that here there was some evidence taken originally connecting prisoner with the crime, though only that of a trap.

Maasdorp, S.G. (for Crown): The real question about the removal is what constitutes a Court; it is plainly constituted by the Magistrate himself, and there is nothing talismanic about the presence of a particular gaoler or messenger. If he had removed it outside the proper district, it would have been an irregularity, but he has not

done so. At all events the accused by appearing has waived any irregularity.

Cur. adv. vult.

Posteà (February 1st).

BARRY, J.P.: In this case the accused was brought before the Resident Magistrate of Humansdorp at a Periodical Court held by him at Storms River in the district of Humansdorp, and charged with contravening sect. 75, Act 28 of 1883. The case was not concluded on the day on which it commenced, and was removed by the Magistrate to the Magistrate's Court at Humansdorp, where on a subsequent day the evidence of an additional witness was taken and the prisoner was found guilty and sentenced. The question that now arises is, had the Magistrate power so to remove a case? When the case was argued the Crown failed to produce any authority showing that he was so entitled, so we must come to the conclusion that he was not. There seems at first sight nothing unreasonable in the contention that a Magistrate who sits in two places should hear at one a case originally commenced before himself at another, but unless the law allows him to do so, he has not this power. There are instances where a Magistrate holds Periodical Courts outside his own district, and it could not be contended that he could move a case commenced at one of these to the Magistrate's Court in his own district. This shows that the argument from what appears reasonable will not hold in this case. The conviction will be quashed.

JONES, J.: In concurring I will only add that I have looked through the authorities and cannot find any precedent which would justify the Magistrate's proceeding in this case.

MAASDORP, J., concurred.

CROWDER *vs.* MACDONALD.

Provisional Sentence—Liquidity—Promissory Note.

Provisional sentence refused on a promissory note where there was evidence that it had been given to plaintiff in settlement of a balance of account, and that plaintiff had at the time undertaken to furnish an account showing that the amount of the note was due to him, and had not done so.

1895. Feb. 1. — Crowder *vs.* Macdonald.

Prayer for provisional sentence on a promissory note for £418 3*s.* made on the 25th July, 1889, by D. Macdonald in favour of S. Crowder.

Defendant opposed and filed an affidavit stating that he had a good defence; that the note had been signed for plaintiff's accommodation; that there were at the time uncompleted transactions between them, and that plaintiff had received moneys on his account which he had not accounted for. A letter of plaintiff's to defendant was annexed, dated 11th March, 1890, enclosing "account as promised," and saying that the real sum due on the note was £244 18*s.*, as £173 5*s.* was placed to defendant's credit as the result of the sale of certain "Monitor" shares sold by plaintiff on his behalf; defendant claimed that this amount should be further reduced by £150 commission on a certain sale due to him, and by various sums received by plaintiff on his behalf. He denied having admitted any balance of account as due by him, or having seen any account except that enclosed in the letter of 11th March, which he had at once objected to.

Plaintiff's affidavit admitted the sale of the Monitor shares, and stated that £244 18*s.* was the sum now due under the note; that the note was made in settlement of the account agreed on between himself and defendant, after going over the books in the presence of one C. W. Smith; and that the only sums of money he had received on defendant's account were on account of, and handed over by him to, the funds of various insolvent estates of which defendant was trustee. There was an affidavit from C. W. Smith stating that he was present when the note was made, and that "after the

settlement of accounts, I heard plaintiff and defendant agree that £418 3s. was due."

Maasdorp, S.G. (for defendant): As between plaintiff and defendant the document was never a liquid one, but only conditional. Defendant never agreed to the account relied on; further transactions have taken place of which no account has been rendered, and plaintiff admits the amount ought to have been reduced by £173 5s.

Sampson (for plaintiff): The sending of the "account as promised" looks at first sight as if the note was conditional, but the only further account required was that about the sale of Monitor shares. The sum for which the note was drawn creates a presumption that it was for a definite balance, and Smith's statement puts this beyond doubt.

BARRY, J.P.: Provisional sentence must be refused in this case; there is evidence that when the defendant signed this note for £418 3s. this was not the correct balance agreed on. It is clear at all events that the defendant did not know this to be the correct balance; that the plaintiff undertook to show that it was, and that he has not done so; he has nowhere shown clearly what credits and debits were allowed by him. This application would have been refused even if made in 1889, but in that year defendant began to dispute the sum and ask for an account; this was not given for six months, and then defendant stated the same objections that he has urged to-day. Plaintiff ought then to have sued in illiquid form both on this claim and on the subsequent items which his affidavits assert are due to him. If that had been done we could have arrived at the facts of the case; defendant would have been asked to show what balance really was owing, and if he had shown the account to be incorrect the Court would have given judgment for whatever was found to be due. Whereas, now, the plaintiff, on his own showing, has come into court without having performed the whole of his obligations; he admits now that the shares were realised and that the balance is different from that which appears in the note, and yet he sues for the larger amount. No explanation has been given of his reason for doing this, and this is an element which influences me in not believing his testimony. The defen-

1895. Feb. 1. — Crowder vs. Macdonald.

dant has shown that this is not a liquid liability and provisional sentence will be refused; the question of costs to stand over.

JONES, J.: The whole gist of defendant's case is that no account was ever agreed on by him. As the evidence now stands I should be sorry to have to arrive at a conclusion either way on this question, so concur in refusing provision.

MAASDORP, J., concurred.

THACKWRAY *vs.* QOLOPO.

Rule of Court, No. 335—*Evidence—Affidavit.*

Where defendant in a case was residing in Mashonaland and plaintiff sued in formâ pauperis, *leave was given to defendant to use as his own evidence an affidavit made by him in a previous stage of the case.*

1895. Feb. 1. — Thackwray vs. Qolopo.

Qolopo sued Thackwray for £38 15*s.*, balance of wages due, and took out a writ of arrest under which Thackwray was arrested in October last; he gave security for the amount, and in October applied unsuccessfully to have the writ of arrest set aside, filing an affidavit for this purpose. Since then he had gone to Fort Salisbury, where he was employed. Qolopo subsequently got leave to continue his action *in formâ pauperis*. Thackwray now applied under Rule of Court, No. 335, for leave to use as his evidence in this action the affidavit filed by him in the application to set aside the writ of arrest.

Maasdorp, S.G. (for applicant), read an affidavit stating the above facts, and also that an application had been made to respondent's attorneys to consent to the admission of this evidence, and that they had refused on the ground that the cross-examination of the applicant would be necessary to the interests of the respondent. He argued that the expense of coming from Mashonaland was excessive, the amount in dispute small, and that plaintiff being a pauper, defendant would in any event have to lose his costs. Plaintiff would

not be prejudiced, as he could apply for a commission or to examine by interrogatories.

1895. Feb. 1. — Thackwray vs. Qolopo.

King (for respondent): Applications under this rule have only been granted when there is an impossibility, or great difficulty from unavoidable causes, of producing the witness; mere inconvenience has never been held sufficient reason. (*Exors. of Schonnberg* vs. *Exors. of Vos*, 1 Juta, 325; *Brink* vs. *Wilson and Glynn*, 1 Juta, 331; *Trust. of Hughes* vs. *Ries*, 2 E. D. C. 83; *Trust. of Francis* vs. *Standen*, 3 E. D. C. 149.) The rule lays down that where it appears to the Court that the other party *bonâ fide* desires the production of a witness for cross-examination and that such witness can be produced, this order shall not be made.

BARRY, J.P.: The application will be granted; applicant will be allowed to use the affidavit referred to as evidence, with leave to respondent to apply for a commission or to examine him by interrogatories. I cannot see how respondent has proved that he desires the production of applicant for cross-examination or how he will be prejudiced by the granting of the order.

JONES and MAASDORP, JJ., concurred.

COPELAND & CREED *vs.* DITTON.

Husband and Wife—Contract—Community—Necessaries.

Where a wife married in community purchases on credit clothing and other necessaries for herself and her children, and subsequently is divorced from her husband, she is liable for one half of the sum owing for necessaries at the date of the divorce.

Appeal from a decision of the Resident Magistrate of East London.

1895. Feb. 1. — Copeland and Creed vs. Ditton.

E. Ditton, duly assisted by her husband, J. Ditton, was summoned to show why she had not paid £8 3*s.* 10*d.*, with interest from 31st March, 1891, being the balance of an account due to Copeland & Creed (linendrapers trading in Grahamstown), for goods sold and delivered between the

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Copeland and Creed vs. Ditton.

31st March and the 31st August, 1891. Defendant excepted that at the time mentioned in the summons, from 31st March to 31st August, she was married in community to A. W. Griffiths, and that he is the proper person to be sued, and not the defendant, who has no *locus standi.*

From the evidence taken in support of this exception it appeared that the defendant was the wife of A. W. Griffiths at the dates mentioned, that the goods in question were obtained by her for the maintenance of Griffiths's children, and that she was divorced from him on 1st February, 1893. It did not appear whether any order was made at the time of divorce respecting the goods in community, or whether there were any such goods in existence. Defendant had since married J. Ditton.

The Magistrate upheld the exception and dismissed the summons. From this decision the plaintiff now appealed.

Maasdorp, S.G. (for appellant): It is quite clear that after dissolution of marriage the wife is liable for half the debts of the community. This was a contract for necessaries, and so the wife had power to bind the common estate: *Brink* vs. *Louw*, 1 Men. 210; *Grassman* vs. *Hoffman*, 3 J. 282.

Sampson (for respondent): From the authorities quoted the wife is clearly liable for half the debt, but not until her husband has first been unsuccessfully sued for the full amount. There should be an averment and proof that proceedings have been taken against the person who has the management of the joint estate (*Faure* vs. *Divis. Council of Tulbagh*, 8 Jut. 92).

[*Per Curiam:* But here there is no evidence that there is any manager of the joint estate, or any joint estate to be managed.]

The appeal was accordingly allowed with costs, and judgment entered for plaintiff for £4 1*s.* 11*d.*, one half the amount due at the termination of the community.

SNODGRASS *vs.* PRETORIUS.

Dog—Destruction of—Injury to Property.

Plaintiff's dog, while travelling with a wagon on a road passing through defendant's unenclosed farm, chased and worried defendant's sheep at a distance of about one hundred yards from the road. Defendant shot the dog, not while it was actually chasing the sheep, but immediately after, and in the belief that this was necessary to protect his property. The special Acts dealing with the destruction of trespassing dogs were not in force in the district. Held, *that the defendant was justified in shooting the dog, and that the owner could not recover damages.*

1895. Feb. 1.

Snodgrass *vs.* Pretorius.

Appeal from a decision of the Resident Magistrate of Elliot, in the Transkei.

Respondent (defendant in the Court below) was summoned to answer the plaintiff's (appellant's) claim for £5 damages for the wrongful and unlawful killing of a dog, the property of plaintiff.

From the evidence it appeared that on the 10th October, 1894, the plaintiff's wagon, with two of his servants, was proceeding through the farm Sunga, half of which is leased to and in the occupation of the defendant; plaintiff's dog accompanied the wagon. While the wagon was passing through defendant's part of the farm, the dog was seen chasing defendant's sheep about one hundred yards from the main road; defendant called to the dog, and it desisted. In a few minutes it again commenced chasing them, and (according to defendant's own statement) he "called to the dog, and when it stopped, and the sheep got away, he shot it." The defendant did not at the time see the wagon, and swore that he believed shooting the dog to be necessary to protect his property. There was no evidence that the farm was enclosed, or that the dog had previously been known to chase sheep. Acts 40 of 1889, and 15 of 1892, dealing with the destruction of trespassing dogs, are not proclaimed in the Transkei. The Magistrate found the following facts to be proved: (1) That the dog was shot by the defendant, and that it was shot while trespassing on his farm at a spot a hundred or more yards from the main road. (2) That it

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was shot in the act of chasing and worrying defendant's sheep. (3) That when he shot it the defendant had every reason to believe it to be a vagrant dog, and the shooting of it to be a necessary act for the protection of his sheep.

On these facts he held that the plaintiff had failed to prove that the dog was unlawfully killed, and granted absolution from the instance with costs.

From this decision the plaintiff appealed.

Sampson (for appellant) referred to Act 40 of 1889, s. 226, and Act 15 of 1892, s. 26, and *Duthie* vs. *Benn*, 11 Jut. 38. These Acts, even if in force, would not justify the shooting of a trespassing dog in an unenclosed place. But these Acts were not in force in the Transkei, so the case must be decided by common law. *Voet*, 9. 1, especially sect. 6, laid down the only redress obtainable for damage by a dog or other animal; here, as the dog was being brought through a place where it had a right to go, the owner was only liable for actual damage done, and could free himself from this by offering to give up the dog.

Possibly the dog could legally have been killed if caught in the act of worrying the sheep, but the Magistrate's finding on this point was not correct; the defendant himself admitted that when the dog stopped he shot it.

King (for respondent): The Acts quoted need not be considered, as they are not in force in the Transkei. The passage from *Voet*, and previous decided cases, notably *Le Roux* vs. *Fick*, Buch. 1879, p. 29, dealt with a different question, viz., what was the remedy at law for damage done by a dog? This case must be decided on general principles of common law. There is no doubt an owner of property may kill a dog which is in the act of destroying his property, if he cannot otherwise prevent it. The only question is whether the Magistrate was right in finding that the dog was shot in the act of worrying and chasing defendant's sheep. What constitutes the "act of chasing" has been defined in *Wills* vs. *Head*, 4 C. & P. 568, and *Protheroe* vs. *Matthews*, 5 C. & P. 581. TAUNTON, J., in the latter case directed the jury, "it is sufficient if the chasing of the deer and the killing the dog were all one and the same transaction," and that the plaintiff (whose dog had been killed) was only entitled to a verdict "If you think the

chasing was at an end and that the dog would not have recommenced."

BARRY, J.P.: The Magistrate has found that the dog was shot while in the act of worrying and chasing the defendant's sheep, and that the defendant apprehended that, unless the dog was shot, the ultimate destruction of some of his sheep must be the result. It is contended that the Magistrate was wrong in his conclusions, but the evidence goes to support him. The dog was some distance ahead of the wagon, and off the main road, which facts in themselves would support the view that he was chasing the sheep; and besides, there is evidence that although he had stopped the moment from chasing them, he was, when shot, in the act of so doing. Under these circumstances the law justifies the owner of the sheep in shooting the dog, and the Magistrate's decision was right. The appeal will be dismissed with costs.

JONES, J.: The Roman Law is not inconsistent with the view stated in *Protheroe* vs. *Matthews*. It is laid down, in dealing with the question of the defence of oneself and property, "The first broad distinction is between a wrong already completed and one in process of consummation or immediately impending. When the wrong is consummated, when the mischief is done, it is never lawful to resort to force; the peaceful remedy of an action or a criminal accusation can alone be employed. But if the invasion on my right, or the attack on my person is not completed, as a general rule force may be used in defence."—*Hunter's Roman Law*, p. 7. I concur in the judgment.

MAASDORP, J., concurred.

Du Toit *vs.* Green and Fitzgerald.

Taxation—Costs—Witnesses' expenses—Junior Counsel—Briefing—Affidavit.

At a trial for malicious prosecution arising out of a criminal suit, the fact of certain witnesses having been called at the hearing of the criminal suit creates a strong presumption that they were material witnesses at the succeeding action, and that consequently their expenses should be allowed on taxation.

The taxing master was held to be wrong in disallowing the expenses of witnesses who were cross-examined by the party now objecting, and others who, though not called, were subpœnaed on advice of counsel. The cost of a Junior Counsel was allowed to the successful party in an action for malicious prosecution which occupied an entire day, and in which eleven witnesses were examined.

When defendant served on plaintiff notice of avail of a record in another case, which could only be used in cross-examination, and plaintiff in consequence included a copy of the entire record in his brief to counsel, it was held that on taxation he could not recover the costs of this briefing.

The Court will allow the expenses of an affidavit made to rebut improper insinuations contained in an affidavit of the other side, even if these insinuations were so manifestly unreliable as to require no answer.

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Du Toit *vs.* Green and Fitzgerald.

This was an application for a review of the taxation of the applicant's bill of costs by the master of the Eastern Districts Court.

The action out of which the bill of costs arose was one for malicious prosecution brought by the applicant against the two respondents at the Circuit Court at Aliwal North before Mr. Justice Laurance. Applicant had previously been charged with theft and acquitted, and it was on the respondents' conduct in promoting this charge of theft that he founded his action. He was successful in it and recovered £40 damages against the respondent Mrs. Green, and £20 against the respondent P. M. Fitzgerald (who was Mrs. Green's son, and also her attorney in connection with

the charge of theft), with costs jointly and severally against the respondents. In the taxation of applicant's bill of costs, several items were struck off, and he now applied to have these items allowed.

The items disallowed which formed the subject of the present application, were threefold:—1. The expenses of certain witnesses. 2. The costs incidental to retaining a junior counsel for plaintiff. 3. The cost of compiling a copy of the record *Q.* vs. *Bradford* to be used at the trial.

Various affidavits were filed by applicant and respondent, and to one of these made by Smuts (managing clerk to applicant) the respondent objected, saying that it was unnecessary, and that the respondent, if unsuccessful in resisting this application, should not be obliged to pay the costs of it. The taxing master stated that he was not asked at the time of taxation to take a note of his reasons for disallowing each item, that owing to the lapse of time since the taxation he was unable now to state them, but that he knew that he had, by consent of the parties, taxed the bill before he had received a copy of the judge's notes at the trial, the respondent Fitzgerald appearing personally at the taxation, and being anxious that it should be completed at once, as he was leaving Grahamstown.

Blaine (for applicant): The witnesses whose expenses were disallowed were eight in number; all these had been subpœnaed, and all except one (Smuts) had given evidence at the criminal trial. Of these eight, four were called and cross-examined; the other four were not called, as the respondents abandoned during the trial the defence of justification, but they had all given evidence at the criminal trial, and the Attorney-General in advising on evidence, had advised that all the witnesses called at the criminal trial should be subpœnaed. The Court would not go behind counsel's opinion as to the materiality of witnesses, and being material their expenses should have been allowed whether they were called or not. (*Shiels* vs. *Wiener* quoted in counsel's argument in *Hofmeyr* vs. *Clear*, 1 Juta, 232, and Rule of Court, 315, s. 14.) The retaining of junior counsel was not only justifiable but necessary; the case was a long one, fourteen witnesses in all being examined, and besides the criminal roll there were six civil cases at Aliwal North,

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in all of which the senior counsel in this case appeared, so it would have been impossible for him properly to get up this case without a junior. The affidavits, too, stated that respondent had intended to employ junior counsel, but only three advocates in all arrived at Aliwal North. The affidavits did not explain clearly why the record in *Q.* vs. *Bradford* was required, but as the respondent had served a notice of avail with respect to it, it became essential for applicant to have a copy of it made out.

Sampson (for respondent): We cannot object to the items for witnesses who were called and cross-examined being allowed, but as to those who were not called the taxing master has a discretion, and no certificate from counsel of their materiality has been put in, as is usually done. The evidence of Rose was thought unnecessary by his own side's counsel, and many of the others merely repeated the same statements. As regards junior counsel, the authorities seemed to show that they should only be employed in cases where some principle of law is involved, not in trivial cases involving only facts. The record in *Q.* vs. *Bradford* could not be evidence, and was not required.

BARRY, J.P.: It appears that in 1890 there was a civil action between one Keeser and Mrs. Green, one of the respondents in the present application. In that action Mrs. Green was represented in the Periodical Court at Lady Grey by a law-agent named Du Toit, the present applicant, and, in the course of the hearing, on his advice, tendered £7 10*s.* in settlement of Keeser's claim. This tender was refused, but the £7 10*s.*, which was placed on the table in the Court-house, between Mrs. Keeser and her agent, disappeared, or was supposed to have disappeared. Not till three years after, in 1893, was any imputation cast upon Du Toit in connection with this disappearance, but in that year a charge of theft of this money was brought against him by Mrs. Green and her son Fitzgerald, acting as her attorney. This charge seems to have been brought not in the interests of justice, but out of enmity arising from circumstances connected with another trial which took place in the same year. At the hearing of this charge of theft various witnesses were called, amongst them all those whose expenses have been disallowed, with the exception of Smuts.

Du Toit was acquitted, and instituted an action for malicious prosecution against Mrs. Green and Fitzgerald, which was tried at the Circuit Court at Aliwal North. In this action he was successful, and recovered £40 damages against Mrs. Green, and £20 against Fitzgerald. There has been no appeal from this decision, and as Fitzgerald could not substantiate his plea that he acted *bonâ fide* without malice in his capacity as attorney for Mrs. Green, we must conclude that his conduct in promoting this charge of theft was actuated by private spite and malice.

At the trial at Aliwal North all the witnesses who gave evidence in the criminal suit were brought again as witnesses, and the question now is whether they ought to have been, and whether the plaintiff is entitled to be paid by defendant the costs of bringing them. The fact of their having been called as witnesses at the criminal trial creates a strong presumption that they were material witnesses at the action for malicious prosecution arising out of it; in addition to this, there is the opinion given by counsel that they were material, and the further fact that three of them were called by the plaintiff and cross-examined on behalf of defendant; notwithstanding this their expenses have been disallowed. As regards these, the taxing master was clearly wrong, and his decision will be reversed. Then three other witnesses, Shaw, Hill, and Bristow, were not called, but, from the records of the criminal case, it looks as if their evidence might have been important. The only plausible ground for disallowing their expenses would be that their evidence was a mere repetition of that of other witnesses, and so was unnecessary. A repetition of evidence may be unnecessary, if, for instance, a dozen witnesses were called to prove what one could sufficiently establish; but there is nothing to show that this was the case here; these witnesses could have given valuable evidence, and would have done so, only that in the course of the case the defendant virtually abandoned his defence of justification. The evidence of the seventh witness, Rose, was not wholly irrelevant, but still was not material, so counsel at the trial thought, and this is a strong presumption that he was not necessary. His expenses will be disallowed; but with regard to the other six, the applicant must succeed. The taxing master has also disallowed the expenses of Smuts, on what grounds does not

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appear; he was called and cross-examined, which alone would create a presumption that he was material, and as there is nothing before us to rebut this presumption, his expenses will be allowed.

As regards junior counsel, I do not wish to lay down a general rule, but I think in this case they ought to have been retained, and if junior counsel had been accessible in this case and had not been employed, I, had I been the Judge trying it, would have said that they ought to have been employed, as an assistance to the Court and to the administration of justice. The respondents themselves showed that they thought this employment justified, as they tried to retain junior counsel themselves, but were unable to do so. This item will be allowed.

With regard to the item for copying out the records of the case *Q.* vs. *Bradford*, I cannot allow this, as the applicant tried to make the respondent liable for the expenses of copying out this long record, solely on account of his having received from respondent a notice of avail in respect of it. As my brother JONES suggested in the course of argument, the proper course would have been to have asked for an inspection of it, and if this had been refused, then the expense of copying it would perhaps have been justified. As it turned out, the whole object of introducing this record was to enable the respondent to refer to the evidence of one witness in the case in order to contradict a statement he might possibly make at this trial—a somewhat remote contingency. My reason, however, for refusing to allow this item, is that when notice of avail was served on him, it was the applicant's proper course, in the first instance, to have asked for inspection; to encourage such charges would be to encourage the heaping up of unnecessary and voluminous briefing.

As to the very lengthy affidavit of Smuts in answer to that of respondent, I said at an early stage that it did not seem necessary, and I do not now think that it was, as respondent's affidavit consisted mainly of insinuations and suggestions imputing improper motives, and altogether was one to which no Court would pay serious attention. Still, the respondent did make these insinuations, and Smuts has replied to them, and although this was not absolutely necessary, still it is not open to respondent to take this

objection, and the costs of this affidavit will be allowed. So far, the application will be granted with costs.

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I may add that if it appears that the Master has acted contrary to the usual practice in taxing these costs before he was in possession of the Judge's notes of the trial, he did so owing to the urgent desire of the respondent that the taxation should take place at a time when he could be present.

JONES and MAASDORP, JJ., concurred.

DU TOIT *vs.* FITZGERALD.

Taxation—Costs—Magistrate's Court Scale.

When costs were awarded in the Circuit Court "on the Magistrate's Court Scale," and the taxing master only allowed witnesses' expenses, calculated as if the case had been tried at the Periodical Court held by the Magistrate in the district where the parties lived. Held, *that he was wrong as, where parties live within a Periodical Court district, the plaintiff can choose either it or the Magistrate's Court of the district as his forum.*

When the Eastern District or Circuit Court allows costs "on the Magistrate's Court Scale," this only refers to the scale of fees, and it is the practice to allow witnesses their expenses to the place they have actually attended at.

1895. Feb. 4. Du Toit vs. Fitzgerald.

This was an application for a review of the taxation of a bill of costs taxed by the Master of the Eastern District Court.

The applicant had sued the respondent (J. T. Fitzgerald) at the Circuit Court held at Aliwal North for damages for assault, and had been awarded £15 damages with costs on the Magistrate's Court scale. All the parties resided at Lady Grey, where a Periodical Court is held, and the seat of the Resident Magistrate of the district is at Aliwal North. In taxing the bill of costs the Master had disallowed the witnesses' travelling expenses to Aliwal North, with costs of subpœna, &c., thinking that costs should be charged as if

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the case had been tried at the Periodical Court at Lady Grey.

A review of this decision was asked for.

Blaine appeared for applicants.
Sampson for respondents.

BARRY, J.P.: If the plaintiff had brought his action in the Magistrate's Court, he could have chosen Aliwal North instead of the Periodical Court at Lady Grey, and if successful would have recovered the costs of trial at Aliwal North. In the absence of words to that effect we are not to assume that Magistrate's Court costs mean Periodical Court costs. I believe, too, the practice is that when only Magistrate's Court costs are allowed the witnesses' expenses are allowed to the place where the trial has actually taken place; the order in fact is directed rather at the practitioner who has advised a wrong forum than at the client who has to pay the expenses of witnesses. The application will be granted, and the matter referred back to the taxing master, with instructions that the costs be taxed as if the case had been tried before the Resident Magistrate at Aliwal North.

JONES and MAASDORP, JJ., concurred.

RUBIDGE, MILLER AND OTHERS *vs.* FOXCROFT.

Sect. 3, *Act* 38 *of* 1884—*Insolvency—Compulsory sequestration.*

An order for compulsory sequestration granted when the grounds relied upon were that a debtor had sent a circular to his creditors offering to assign his estate, and alleging that if this offer was refused he must surrender it.

A provisional trustee appointed where the assets in the estate consisted mainly of ostriches and other live stock.

1895. Feb. 12.

Rubidge, Miller and others vs. Foxcroft.

Petition of various creditors of W. W. Foxcroft, of Aberdeen, for a final order of sequestration against his estate. The petition set forth that on the 29th December last the said Foxcroft, through his attorney, caused circulars to be

sent to his creditors proposing, owing to financial difficulties, to assign his estate for their benefit, and saying that if this offer was not accepted he would be obliged to surrender his estate as insolvent, which course would involve the creditors in considerable expense. The petition further stated that the creditors had refused this offer, and that one creditor for £55 had sued Foxcroft in the Resident Magistrate's Court of Aberdeen, and that the case would be tried on February 28; that respondent has accordingly committed an act of insolvency, and that it would be for the benefit of the creditors that the estate should be sequestrated.

Tamplin for the petitioners.

Maasdorp, S.G., for respondent: There is no allegation that the estate is insolvent; all the petition shows is that the debtor being pressed by one creditor made an offer to surrender. Under the Act strict proof of insolvency is required. Even if grounds for sequestration are shown, we ask for a postponement. The affidavit of the respondent's attorney shows that respondent is now ill, that the majority of creditors are willing to accept an assignment, and that sequestration will mean a loss to all concerned.

BARRY, J.P.: This respondent's contention really amounts to an application for postponement, and no sufficient ground for this has been shown. The hope that the creditors may consent to an assignment is one that may be frustrated by the refusal of any one creditor, and the present opposition looks like an attempt to coerce creditors into consenting. Final order of sequestration will be granted.

JONES and MAASDORP, JJ., concurred.

Tamplin applied on behalf of the same creditors for the appointment of a provisional trustee. The insolvent's estate consisted mainly of live stock, ostriches, &c., and applicant's petition stated that there was reason to believe stock had been removed from the farm since respondent got into difficulties.

Maasdorp, S.G., opposed on the ground that no necessity had been shown. The estate is an ordinary farm, and there

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is no mention of perishables or anything requiring immediate attention.

BARRY, J.P.: The case is one where a provisional trustee ought to be appointed, even without the statement in the affidavit that stock have been removed. The fact of there being ostriches and other stock requiring attention on the farm makes the appointment of a provisional trustee highly desirable, but the statement referred to makes it essential.

JONES and MAASDORP, JJ., concurred.

MOLONEY *vs.* DE VILLIERS.

Service—Deputy-Sheriff.

The messenger of the Resident Magistrate's Court was appointed to serve all processes in a case where the Deputy-Sheriff of the district was defendant.

1895. Feb. 15.

Moloney vs. De Villiers.

Sampson (for plaintiff) applied for an order appointing the messenger of the Resident Magistrate's Court of Uitenhage to serve all processes in the above action to be brought at the Circuit Court of Uitenhage.

From an affidavit of plaintiff's attorney it appeared that Mrs. Moloney, in her capacity as executrix testamentary to her deceased mother, was suing Mr. A. P. de Villiers at the next circuit to be held at Uitenhage; that he was deputy-sheriff for the district of Uitenhage, and that consequently the appointment of some one to serve process on him was necessary.

The order was granted, costs to be costs in the cause.

STANTON *vs.* GREATHEAD AND CHEW.

Sect. 7, Act 23 of 1891—Jury in Civil Case.

Leave to try a civil case by jury where the amount in dispute did not exceed one hundred pounds granted on a petition from defendant stating that a conflict of evidence about material questions of fact would arise in the case.

1895. Feb. 16. — Stanton *vs.* Greathead and Chew.

This was an application under sect. 7, Act 23 of 1891, for leave to try by jury a case in which the applicant was defendant and respondents were plaintiffs.

Applicant's petition stated that he had been sued by respondents (who are medical practitioners practising in partnership in Grahamstown) for £61 19*s.* for medical attendance from the 5th January till the 30th January, 1894; that he had tendered £36 14*s.* in full settlement, leaving a sum of £26 5*s.* in dispute, and that he estimated the costs of the action would exceed £50. That on the 5th January he had suffered an injury to his arm, owing to being thrown from his horse, and that from that date till the 30th January respondents or one of them had attended him twice daily in conjunction with Dr. Saunders, his regular medical attendant; that these visits had been charged for as consultations, whereas they ought to have been charged as ordinary visits; and that on the trial of the case a conflict of evidence would arise about material questions of fact, and that it was desirable these should be tried by a jury.

Maasdorp, S.G. (for applicant): As the amount claimed was under £100 it is necessary to apply to the Court for leave. The question to be tried was an issue of fact as to whether these visits were ordinary medical visits or consultations, and there was conflicting evidence as to what occurred when Dr. Greathead first visited the applicant, and also at the subsequent visits.

Blaine (for respondents): When the legislature gave the Court a discretion in cases involving less than £100, the intention was that the party applying for a jury in such case must show peculiar circumstances making trial by jury desirable. None such had been shown here; in fact,

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the question was as to the reasonableness of certain charges, and so not a jury question at all. Even if an issue of fact arose as to whether these were visits or consultations, that question was not one requiring for its solution the complicated machinery of a jury. The expense involved was out of all proportion to the amount claimed.

JONES, J.: It appears from the applicant's affidavit that there are questions of fact to be tried in this case; whether these will be complicated or not there is nothing to show. Questions will also arise as to the credibility of witnesses, and one or two of these appear to be serious. Without in any way expressing an opinion about these or even discussing what they will be, I will merely say that it appears a fit case to be tried by a jury. The application will accordingly be granted; the question of costs to stand over.

MAASDORP, J., concurred.

Q. *vs.* HART.

Sect. 5, *Act* 36 *of* 1886—*Game—Close Season.*

A landowner in the close season killing game found injuring crops in his cultivated land or garden is not exempt from the penalties of sect. 5, *Act* 36 *of* 1886, *making it an offence to kill, pursue, shoot at or possess game in the close season.*

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Queen vs. Hart.

Appeal from a decision of the Resident Magistrate of Albany.

Accused was charged with contravening sect. 5, Act 36 of 1886, in having in his possession game, namely, one buck in the close season, and after the expiration of one week from the commencement of such close season.

From the evidence it appeared that on the 12th October, more than one week after the commencement of the close season in the Albany district, the accused's servant was found at the railway station with a bag containing the leg of a buck; the bag was addressed by the accused to a friend at Port Elizabeth. Accused did not deny having been in

possession of the buck, but proved to the Magistrate's satisfaction that it had been killed by him when found injuring crops in his cultivated lands.

Sect. 5, Act 36 of 1886, provides that no person shall kill, pursue or shoot at game in any district in the Colony during the close time, or shall possess, sell, hawk or expose for sale game in such district after the expiration of one week from the commencement of the close time which shall be proclaimed for any such district, under a penalty of four pounds sterling for the first offence.

Accused was found guilty and fined £4.

The Magistrate in his reasons stated: "Had accused been charged under sect. 4 I would have acquitted him, but sect. 5 has no proviso in favour of a landowner who is found in possession of game, even if it has been killed in the act of destroying crops. If sect. 5 had left the amount of the fine in my discretion I would have imposed the smallest possible."

Burke (for appellant): Sect. 4 of the Act (making it an offence to shoot game without a licence) has a proviso exempting landowners who kill game destroying crops. Sect. 5 has no such proviso, but it cannot have been the intention of the legislature to force landowners to look on and see their crops destroyed without interference. Accused here is charged with possessing a buck, but if his killing it originally was lawful the possession of it remains lawful. English cases decided under 1 & 2 Wm. IV., Ch. 32, show that statutes making the possession of game unlawful do not apply to every instance of possessing—*e.g.*, to the possession of game imported from abroad in the close season at home (*Simpson* vs. *Unwin*, 3 B. & A. 134; *Warneford* vs. *Kendal*, 10 East; *Guyer* vs. *The Queen*, 23 L. R., Q. B. D. 100).

Maasdorp, S.G. (for Crown): In the cases quoted where possession was held lawful, the original killing was lawful; not so here, as sect. 5 makes it an offence to kill game in the close season. No person is allowed by the Act to kill game in the close season; not even a landowner who finds it destroying his crops. This may be a *casus omissus* by the legislature, but the Court cannot rectify it. The Magistrate need not have inflicted the full penalty; it has been decided that the words "shall be liable to a penalty of £50 for each

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offence," means £50 or any lesser amount. (*Q.* vs. *Nonosi*, 1 App. Cas. 154.)

Cur. adv. vult.

Posteà (Feb. 19th).

BARRY, J.P.: This is an appeal from a conviction by the Resident Magistrate of Albany. The appellant was convicted for having in his possession a portion of a wild buck during the close season. The evidence supports the finding that the accused was in possession of a buck during the close season, but the appellant relies upon the evidence at the trial, showing that the buck in question was destroyed by him while injuring his crops. This evidence the Magistrate believed, but he convicted the appellant on the ground that such destruction did not justify the killing of the buck. The Crown relies on the words of sect. 5, Act 36 of 1886, as supporting this conclusion. The words of that section are: "No person shall kill, pursue or shoot at game in any district in the Colony during the close season, or shall possess, sell, hawk or expose for sale game in such district after the expiration of one week from the commencement of the close time which shall be proclaimed for any such district, under a penalty of £4 for the first offence and £8 for every subsequent offence." The appellant, however, refers to the wording of sect. 4, where it is provided that no person shall kill game without having previously obtained a game licence, "excepting herefrom any game found injuring crops in cultivated lands or gardens," and argues that under this exception, and also under Common Law, which allows a man to destroy vermin injuring his property, he was justified in shooting and possessing the game in question. It is remarkable that by Lord Charles Somerset's Game Law Proclamation, sect. 8, it was lawful for any proprietor or occupier of land which shall have been brought into cultivation to kill, destroy, or drive forth from such land under cultivation, all and every species of game which has entered to the annoyance and injury of the proprietor or occupier, and that this provision has been repealed. The contention for the Crown consequently is that not having re-enacted this provision, the Statute of 1886 clearly meant to deprive any owner or occupier of the right

to destroy game injuring crops during the close season. The answer given to this argument is that it is virtually re-enacted in sect. 4, Act 36 of 1886, under the words "excepting herefrom any game found injuring crops in cultivated lands or gardens." It certainly appears remarkable that this exemption of game found injuring crops in cultivated lands was not made applicable to the close season, seeing that it is reasonable that growing crops should be protected as much during the close season as in the shooting season. But the legislature has the power of imposing a penalty on any shooting or possession of game, and as it seems to have exercised that power under the provisions of sect. 5, already quoted, we are bound to give effect to the law. In the present case it does not appear that the lands were enclosed, nor does there seem to have been anything like an invasion of trek buck. A single buck only was shot, and this buck was expected by the farmer, who lay in wait for it. It may be that the legislature in passing this stringent law thought that if a power were given to kill game in cultivated lands during the close season, some farmers might cultivate a patch of land, possibly near to neighbours who prized and preserved their game, and might attract and destroy game, when killing would be fatal to the propagation and preservation of game. It may also be that the legislature thought that game could be kept out of cultivated lands if they were properly enclosed, and that to allow the destruction of any game during the close season would render it impossible to protect game. The circumstances of this case do not prove that it was impossible to protect the crops without shooting the game, and this circumstance, coupled with the wording of sect. 5, force me to concur in the Magistrate's finding and sentence, and to dismiss this appeal.

JONES, J.: I quite concur: sect. 5 makes no proviso such as that in sect. 4; this may be an error, but if so, it can only be rectified by the legislature, and not by this Court, or any Judge-made law.

MAASDORP, J.: I concur. I would like to refer to one case mentioned in argument, *Guyer* vs. *Reg*, where the possession of two partridges in England during the close season was held to be lawful, where the partridges were proved to

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have been imported from Russia. In the judgment in that case, another case, *Whitehead* vs. *Smithers*, 2 C. P. D., was referred to, which seems to be very similar to the one before us now. There the possession of wild-fowl in the close season was held to be illegal, though the wild-fowl were foreign birds, and killed abroad. The Court in distinguishing it from *Guyer* vs. *Reg*, held that one ground of distinction was that under a former Act, viz., the Wild Birds Protection Act, 35 & 36 Vict. c. 78, wild-fowl received from any person outside the United Kingdom were exempted from the provisions of the Act, and that this exemption had been omitted from the new Act, 39 & 40 Vict. c. 29, under which *Whitehead* vs. *Smithers* was decided, hence the Court concluded this omission to be intentional, and that the legislature expressly withdrew protection from those dealing with wild-fowl imported from abroad. So here, in a former Act, there is an exemption in favour of landowners shooting game destroying crops, and as this exemption has not been re-enacted, we must conclude the attention of the legislature was directed to this point; similarly the fact of the proviso appearing in sect. 4 is an indication that its omission from sect. 5 is intentional.

I suggested during argument that a difficulty might arise in holding the portion of a buck to be a buck or game within the statute; this point was not raised, so I refrain from expressing any opinion as to how it would have to be dealt with if it were raised.

BAILEY *vs.* MELROSE.

Rule of Court 315—*Taxation of Costs—Witnesses' Expenses.*

The tariff of charges for witnesses' expenses laid down in Rule of Court 315 *must be strictly adhered to with respect to all witnesses coming under the descriptions enumerated in it, and allowance only be made for the actual days they have attended the Court.*

In estimating witnesses' expenses, a clerk cannot be rated on a higher scale because he is manager of a store or of a department of one; nor can a retail dealer claim a higher rate because he is a direct importer.

Defendant in a suit cannot refuse to pay costs of witnesses subpœnaed by plaintiff on the ground that these witnesses, at the time of the trial, were servants of defendant, and in receipt of wages as such.

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Bailey vs. Melrose.

This was an application for a review of a taxation of costs taxed by the Taxing Master of the Eastern District Court.

The suit out of which the taxation arose was originally set down for trial at the Circuit Court at Queenstown, and when called on there, was removed to the Eastern District Court at Grahamstown. T. Bailey, the unsuccessful defendant in the suit, now applied to have certain costs disallowed as excessive, which were allowed by the Taxing Master; the items objected to fell under two heads: (*a*) witnesses' expenses at Queenstown: R. Henderson, £3; E. Lance, £3; W. Thomson, £2 10*s.*; W. G. Thomson, £2; T. Davison, £3; J. Preston, £2; (*b*) witnesses' expenses attending at Grahamstown: J. Melrose, £14 0*s.* 6*d.*; T. Davison, £14 0*s.* 6*d.*; R. Henderson, £11 18*s.* 6*d.*; W. Thomson, £11 18*s.* 6*d.*; J. Preston, £13 18*s.* 6*d.*; E. Lance, £11 18*s.* 6*d.*

Burke, for applicant (defendant in original suit): At the time of the Queenstown trial four of the witnesses were in defendant's employment, and in receipt of wages from him during the days of trial, and consequently should be paid nothing for their attendance in Court. The Circuit Court only lasted three days, yet witnesses' expenses had been allowed for four days; besides, all the witnesses resided in the circuit town, and four of them were clerks to Bailey, a wholesale dealer, and so came under class (*d*), and were only entitled to 4*s.* a day each; of the other two, one was in a retail dealer's employment, and so, under class (*e*), was only entitled to 3*s.* 6*d.* a day, while the other, out of employment at the time of trial, belonged also to the rank of clerk, yet 15*s.* a day was allowed to each of them. So with regard to the trial at Grahamstown, each of the witnesses (including the plaintiff, a clerk in Bailey's employment) had been allowed £1 1*s.* a day for the seven days of the trial, in addition to £6 13*s.* 6*d.* railway fare. As they came under class (*d*), 12*s.* 6*d.* a day each, for attending at a distance, was the maximum that could be allowed. Besides, one of them, Lance, had not returned to Queenstown, so only a single fare, not a return ticket, should be allowed for him.

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Blaine, for respondent (plaintiff in original suit): The fact of witnesses being in defendant's pay does not disentitle them to the ordinary remuneration of witnesses. As regards Lance, we admit he should only be allowed a single railway fare. Applicant's main contention, that the witnesses' expenses have been calculated on a wrong scale, is untenable; the five witnesses described as clerks are really heads of departments in a large store, and in quite a different position to an ordinary subordinate clerk; it is absurd that they should be remunerated on the same scale. Their employment, like many others, is not enumerated in any of the seven classes in Rule 315, but the words of the Rule allow great latitude to the Master; the scale is not to be slavishly adhered to, but expenses "shall be calculated as nearly as possible" according to the scale; their employment and ordinary income is much more akin to class (*b*) than class (*d*).

BARRY, J.P.: The applicant in this case has taken up a wrong position in what he says about these witnesses having been at the time of the trial in his employment and receiving pay from him. This fact would not in any case disentitle them to witnesses' expenses, and certainly not here, as there is evidence that they made up by overtime for the time lost in attending Court. The defendant is wrong in taking up this position, but the question is not whether he is right in every contention that he has raised, but whether some of them are well-founded. To take the case of Henderson first, I think there is no doubt that the £3 allowed to him for his attendance in Queenstown is excessive; he attended the Circuit Court for three days, and I do not see upon what principle three has been converted into four in allowing his expenses; his attendance must be regarded as for three days. Then he is a clerk to a person holding a wholesale licence for the sale of merchandise, and as such is entitled to 4*s*. a day for attending the Court held in the place in which he resides. He is a clerk, perhaps of a higher class, but still nothing but a clerk, and 4*s*. a day being laid down as his remuneration, it would seem to follow that that sum is all that he is entitled to. It has been argued that a latitude is allowed, and that the words "as near as possible" act as a saving clause; but they do not

mean as near as possible to 4*s.*, they only apply to the case of a witness whose trade or profession is not enumerated; a clerk is among the classes enumerated, and so the scale must be adhered to. Four shillings a day will be allowed for his expenses and for three days. So with regard to Lance and the two Thomsons: in each of these case 12*s.* in all must be allowed. Next we have to deal with Davison, and here the saving clause, in a way, applies; Davison was, at the time of the trial, a gentleman at large, but having just left a clerk's employment, and no doubt aspiring to be again employed in the same capacity, he will be treated "as nearly as possible" according to the scale, and allowed expenses as if a clerk. Preston is a retail dealer, and as such is only entitled to 3*s.* 6*d.* a day, but as he is also a direct importer, it is urged that he must be treated as a wholesale merchant. If he were the holder of a wholesale licence for the sale of merchandise he would come under both classes (*c*) and (*e*), and would be entitled to his expenses under (*c*); but he is not such a holder, and as people may import goods for retail dealing, the fact of his being a direct importer makes no difference, but leaves him still a retail dealer.

With regard to the expenses in attending the Eastern District Court, Melrose, being a clerk, can only claim 12*s.* 6*d.* a day, not one guinea as allowed; this allowance for seven days, added to £6 13*s.* 6*d.* for railway fare, makes a total of £11 1*s.*, instead of £14 0*s.* 6*d.* The same principle of calculation must be applied to Henderson and Davison. Preston, who was shown to be a retail dealer in Queenstown, remains the same in Grahamstown, and so is only entitled to 10*s.* a day in addition to his railway fare. Thomson, who was a clerk at Queenstown, must again be treated as a clerk, not perhaps the same grade of clerk as Melrose, but the law has not thought fit to make any distinction, so they will both be treated on the same footing. In Lance's case there will be a reduction of his expenses to 12*s.* 6*d.* a day, and only a single railway fare will be allowed. The Taxing Master's fees will be reduced in proportion with this reduction in costs. The Rule appears to have been fairly applied to the condition of each witness, and the Master erred in thinking they did not come under the various descriptions under which the applicant has classified them.

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As there has been a substantial reduction, the applicant is entitled to his costs.

JONES and MAASDORP, JJ., concurred.

WHITE *vs.* PATTERSON.

Sect. 5, *Act* 45 *of* 1882—*Corporate Body—Municipality —Summons.*

A municipality duly incorporated under Act 45 *of* 1882 *can only sue in its proper corporate name.*

1895. Feb. 19. — White vs. Patterson.

Appeal from a decision of the Acting Resident Magistrate of Cradock.

The defendant had been summoned to show why he had not paid to Bruce A. Patterson in his capacity of town clerk of Cradock the sum of £1 19*s.* 8*d.*, being the price of certain butter together with various fines and penalties due under sect. 5 of the Municipal Regulations of Cradock. Defendant excepted to the summons on the ground that it was issued in the name of Bruce A. Patterson, town clerk, whereas it should have been issued in the name of the mayor and the members of the municipality of Cradock; and also on the ground that the warrant to sue (which was signed by B. A. Patterson as town clerk) should have had the words "by order of the council" added. The Acting Resident Magistrate overruled this exception, and from this decision the defendant now appealed.

Maasdorp, S.G. (for appellant): Sect. 5, Act 45 of 1882, provides that the inhabitants of every city, town or village subject to the provisions of that Act shall, under such name or designation as the governor may by proclamation declare, be a body corporate, and shall by such name be capable in law of suing and being sued. Cradock had received as its designation the municipality of Cradock (*Proclam.* 17 of 1883). A corporate body could not sue or be sued except by its proper corporate name. (*Dicey's Parties to an Action*, Rule 25; *Patterson* vs. *Pearson and others*, 5 Buch. S. C. 45; *J. O. Smith* vs. *Stewart*, Buch. S. C. 1868, pp. 48 & 253;

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Ludhope vs. *Somerset East Bank*, 1 Ros. 304.) The power given to sue is also informal. Rule 67 of the Municipal Regulations requires that it should be signed by the town clerk by order of the Council.

Sampson (for respondent): A discharge by the town clerk would have operated as a valid discharge of the debt; this is enough to give him the right to sue.

BARRY, J.P.: It is surprising to find that when a particular course has been laid down by the section of the Act, this course has not been followed. The exception to the summons is good, and the appeal must be allowed with costs here, and in the Court below.

JONES and MAASDORP, JJ., concurred.

LOCKE *vs.* MAVIN.

Contract—Delivery—Sale of Shares.

When the buyer of a call or option of purchasing shares within a fixed period exercises this option by giving notice to the seller that he will take over the shares on a date within the fixed period, it becomes the seller's duty to offer delivery at the date appointed, and he cannot subsequently refuse to deliver the shares on the ground that the buyer has not within the fixed period asked for delivery and tendered the purchase price.

1895. Feb. 19. Locke vs. Mavin.

This was an argument on exception.

Plaintiff's declaration set forth that plaintiff was a broker in Grahamstown, and defendant a broker in Port Elizabeth; that on or about the 29th of October, 1894, the plaintiff purchased from defendant the right to call or declare his intention of purchasing one hundred shares in the Buffelsdoom G. M. Company at thirty-four shillings at any time up to and including the 26th December, for which right he had paid £15. Such shares were to be called for at Johannesburg or delivered there at buyer's option. In pursuance of this contract plaintiff on the 20th, and again on the 22nd December, gave defendant notice of his intention to

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accept delivery on December 26th, and named one Dold as his agent to accept delivery. By a custom of trade at Johannesburg, and by the rules of the Johannesburg Stock Exchange, it thereupon became the duty of the defendant to deliver these shares before 12 o'clock on December 27th. On December 27th before 12 o'clock plaintiff tendered to defendant's agent at Johannesburg payment of the agreed purchase price, and demanded delivery, but defendant refused to accept the purchase price or to deliver the shares, whereby plaintiff had suffered damage to the extent of £250.

Defendant excepted to this declaration on the ground that it did not disclose any cause of action.

Sampson (for defendant) in support of the exception.

In accordance with the contract plaintiff had to exercise his option and tender the purchase price of the shares on or before December 26th; he did not tender till December 27th, a day too late, and tries to justify this by pleading a special trade custom at Johannesburg. An express term in a written contract cannot be varied by a trade custom.

[*Per* BARRY, J.P.: Plaintiff says he exercised his option on the 20th and 22nd, and named the agent who would take delivery. It then became your duty to tender delivery to this agent; did you do so?]

That is not the ground plaintiff takes; the right to call means that buyer can demand delivery on tendering purchase-money; plaintiff admits this by saying that he went and tendered on December 27th, but this was a day too late; consequently he never exercised his option within the fixed period: and tries to get an extension of the contract time by pleading a special custom.

Maasdorp, S.G. (for plaintiff) was not called upon.

BARRY, J.P.: The exception must be dismissed; facts disclosed in evidence may show that the plaintiff has himself broken the contract, and so is not entitled to recover damages, but as the case stands in his declaration he has a good cause of action.

JONES and MAASDORP, JJ., concurred.

Ex parte MALAGASI.

Interdict—Husband and Wife—Divorce—Community.

Interdict granted against a husband on the application of his wife married in community to restrain him from disposing of the immovable and other specified property of the marriage pending an action for divorce.

1895. Feb. 21.

Ex parte Malagasi.

This was an *ex parte* application by Malagasi, *alias* Matlala, for an interdict restraining her husband Rooy Batje Malagasi from disposing of the property of the marriage pending an action for divorce to be brought by her at the Circuit Court to be held at Port Elizabeth on the 11th March.

Blaine (for applicant) read a petition from Malagasi stating that in 1871 she had been married to Rooy Batje Malagasi in community of goods at Port Elizabeth; that in 1883 he had commenced to ill-treat her, and had refused to support her, and that she intended to bring an action at the next Circuit Court at Port Elizabeth for divorce on the ground of adultery, and for forfeiture by him of the benefits of community. Petitioner was possessed of immovable property at Port Elizabeth, and also since marriage had brought into the community over a hundred cattle, the result of her own work and labour. Respondent had removed several of these cattle, and was endeavouring to sell and dispose of the joint estate in order to defeat the just claims of the petitioner.

A rule nisi was granted returnable on the last day of term, to operate as an interdict restraining the respondent, or any one else in whose possession they might be, from dealing with or disposing of the immovable property or the cattle, the property of the joint estate, pending an action for divorce; such action to be brought within one week from the granting of the order.

QUEEN *vs.* INGRAM.

Act 13 *of* 1870—*Summons—Licence—Dealing in gunpowder.*

In a charge under sect. 6, *Act* 13 *of* 1870, *of exercising the trade of a dealer in gunpowder without having previously taken out the licence required by law, it is necessary to set forth particulars of the act or acts which are relied on as amounting to the exercise of the trade.*

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Queen *vs.* Ingram.

Appeal from a decision of the Resident Magistrate of Aberdeen.

Accused was charged with contravening sect. 6, Act 13 of 1870, in that during the months of May and June, 1894, at Alleman's Kloof in the district of Aberdeen, he did wrongfully and unlawfully exercise the trade or business of a dealer in gunpowder by selling a quantity of gunpowder without having previously taken out the licence required by law.

The section provides that if any person, who should under Act 3 of 1864 take out and possess any licence authorising him to practise any profession, or exercise any trade, business, occupation, or calling, shall be proved to have done or performed, without having previously taken out the particular licence in that behalf required, any act amounting to or in the way of the practice of any such profession, or the exercise of any such trade, business, occupation, or calling, such person shall for every such act forfeit any sum not exceeding five times the amount of the charge for such licence. Act 20 of 1884, which amends and incorporates the tariff for licences in Act 3 of 1864, provides that a £5 licence shall be necessary for dealing in gunpowder.

Accused was found guilty and now appealed, the ground relied on being that the summons was bad in law as it did not state either the quantity of gunpowder sold, the occasion on which or the person to whom it was sold. There was also an affidavit filed stating that the accused had been prejudiced in his defence by the absence of a material witness.

Sampson (for appellant): The summons is clearly bad as

not setting forth particulars of the alleged offence; the case is governed by *Q.* vs. *M'Glashan*, 9 E. D. C. 9, and the cases there quoted; these were decided under the liquor licensing acts, where the offence is selling or dealing in intoxicating liquor. Under Act 13 of 1870 the summons must be even more distinct, as the offence is "to do any act amounting to the exercise of the trade."

Maasdorp, S.G. (for Crown): If the summons merely stated that accused dealt in gunpowder, it would be defective, as dealing could be constituted in many different ways, but the addition by selling, etc., set forth the particulars sufficiently. (*Q.* vs. *Rittman*, 4 E. D. C. 309; *Q.* vs. *Shortal*, 5 J. 203).

Sampson: In these cases the point was not raised.

Cur. adv. vult.

Posteà (February 26).

BARRY, J.P.: This is an appeal from a conviction before the Resident Magistrate for the district of Aberdeen, where Ingram was charged with contravening sect. 6, Act 13 of 1870, in exercising, during May and June last, the trade or business of a dealer in gunpowder by selling a quantity of gunpowder without a licence. The ground of appeal relied upon is that the charge failed to state what the particular act of sale was, so that the accused was prejudiced in his defence by not knowing what act was imputed to him, in the absence of any allegation as to whom the sale was made, or that it was made to some particular person whose name was to the prosecutor unknown.

The appellant relies on *Q.* vs. *Vipond*, 1 Men. 551; there a conviction was set aside by the Supreme Court where the accused was indicted for contravening sect. 8, Ord. 54 of 1828, which made it an offence to sell intoxicating liquors, and the charge did not state the name of the person to whom the defendant was supposed to have sold the wine forming the subject matter of the charge. The case of *Q.* vs. *Bolt*, in 1888, followed this ruling, and again in *Q.* vs. *M'Glashan*, 9 E. D. C. 9, on the authority of *Q.* vs. *Vipond*, this Court held that in a charge under sect. 75, Act 28 of 1883, for selling intoxicating liquors, it is not enough to say that the accused sold without a licence, but the indictment

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must state that he sold to some particular person. No doubt the tendency of recent legislation is to modify, in certain instances, this rule; for instance, in the Municipal Act of 1882, sect. 174 provides that in charges before the Resident Magistrate of violating municipal bye-laws or regulations it shall not be necessary to allege the act complained of, or to quote the special bye-law which has been violated. But with the ruling in *Vipond's* case before us, we cannot give a construction to the Rules of Court applicable to procedure, either in the Higher Courts or before a Magistrate, at variance with that decision. I should not regret the existence of a rule of law which prevented an accused from taking an advantage of an irregularity in procedure, unless he can show that he has probably been prejudiced by it at his trial; or if the Supreme Court could construe the ruling in *Vipond's* case as limited to the circumstances of that particular case. In the present case, however, there is an affidavit stating facts which virtually show that the appellant was probably prejudiced by not knowing precisely what the mature of the dealing he was charged with was, or with whom he was accused of dealing; so in allowing the appeal, it is not on mere technical grounds that we do so. All the proceedings, including the conviction and sentence, will be quashed.

JONES and MAASDORP, JJ., concurred.

COWIE *vs.* ELLARD & Co.

Wrongful dismissal—Contract—Evidence.

The words "photographer's assistant," appearing in a contract, are sufficiently ambiguous to allow evidence to be led of the requirements which the employer expected in his assistant, when those requirements were known to the other party to the contract and led him to apply for and accept the post of assistant.

Where plaintiff entered into a contract for employment as photographic assistant to the defendant, knowing that a first-class re-toucher and assistant operator was required, and was placed in the sole management of a studio, where

he worked without any supervision or assistance from his employer.

Held, *that the fact of his sending out work that was not first-class, and some of it not even good, was not sufficient to justify the employer in terminating the contract and dismissing him.*

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Cowie vs. Ellard & Co.

The plaintiff in this case, George Cowie, claimed £384 damages for wrongful dismissal by the defendants, with whom he had entered into a contract for employment as a photographic assistant.

The declaration alleged that on or about the 7th August, 1894, the plaintiff entered into a written contract with the defendants, who are photographers, trading under the name of John Ellard & Co., in Grahamstown, whereby the defendants engaged the services of the plaintiff as an assistant in their photographic business for the term of three years, commencing from the 2nd August, 1894, at a salary of £10 per month, with a commission of five per cent. upon all takings in the said business, the plaintiff agreeing to render his services to the defendants at all fair and reasonable times as a photographic assistant, which undertaking the plaintiff has faithfully performed. On or about the 2nd day of November, 1894, the defendants wrongfully and unlawfully and unjustifiably dismissed plaintiff from their service with one month's notice, and refused, and still refuse, to employ him any further, or to pay him any portion of the salary agreed upon. The plaintiff has at all times been willing, and has tendered, and hereby again tenders, to perform all services required of him as photographic assistant in terms of the said contract. The plaintiff has suffered damages in the sum of £384 by such wrongful dismissal, being £320 for loss of salary to 2nd August, 1897, and £64 for commission on probable takings, all which defendants refuse to pay.

The defendants' plea admitted the contract and the dismissal, and set forth that at the time when the said agreement was entered into the plaintiff represented to the defendants that he was a skilled photographer, and competent to act as photographic operator and re-toucher, and to work up enlargements of photographs in black and white, and generally to do and perform all work connected with

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the management and working of a photographic studio. The plaintiff is not a skilled photographer, and is wholly incompetent to do the work of an operator and re-toucher, or to work up enlargements, or to do or perform the work connected with the management and working of a photographic studio in a proper and workmanlike manner. The plaintiff has not, as required by the terms of the contract, diligently or faithfully employed himself in the said business, but has failed to do his duty in the following particulars:—

(*a.*) Shortly after the plaintiff entered the said business the defendants instructed him to take views of the town and streets of Grahamstown, and to make specimens of enlargements and portraits and to re-arrange the reception room with a view to the advertising and development of the said business, which instructions the plaintiff has wholly failed to carry out.

(*b.*) The plaintiff was further instructed to keep a proper day-book in connection with the said business and to send out accounts regularly, together with the completed orders, if not paid for at the time of sitting, but the plaintiff kept the said day-book in a disgraceful and unintelligible manner, and very few accounts were rendered at all.

(*c.*) The plaintiff further failed to carry out other specific orders given him by the defendants, more especially in the case of certain orders sent to him by Mr. John Ellard, one of the defendants, from Palapye in the British Protectorate, and certain orders given him by the defendants with respect to photographing the members of a certain club in Grahamstown, to wit, the Literary and Social Institute.

The defendants thereupon, though not legally bound thereto, gave the plaintiff a month's notice, as they legally might. The plaintiff (after an exception which is dealt with in the judgment of the Judge President) joined issue with defendants as to his incompetency and the alleged failures to do his duty, and with regard to the alleged misrepresentation set forth that in applying for employment by defendants he stated to their agents, Messrs. Wratten and Wainwright, that he had been for a certain number of years in the photographic business and that he was then managing a studio in Aberdeen, and that he was fairly well up in all branches of photographic work; that as to working in black and white, defendants or their agents appointed one

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Mr. Belton, a photographic artist, to inspect plaintiff's work on their behalf; that Belton did so inspect his work, and that thereafter defendants entered into the aforesaid contract with plaintiff to take the position of photographic assistant, and made no contract with him to work the special photographic branch of enlargements or to take the charge and management of a studio.

The contract annexed to the declaration was signed by the plaintiff at Aberdeen, Scotland, on the 30th June, 1894, and by plaintiff and defendant at Grahamstown on the 7th of August, 1894. The material parts of it provided "that John Ellard & Co. do hereby agree to engage the services of George Cowie as an assistant in the photographic business they intend carrying on in Grahamstown," and "that the said George Cowie shall and will devote his whole time and attention to the said business and shall diligently and faithfully employ himself in and about the said business; if he shall in any manner whatever misconduct himself or fail to carry out his duties with regard to such business, the said John Ellard shall and will have the right to dismiss the said George Cowie from their service;" defendants further contracted to pay him the sum of £10 per month and a commission of five per cent. upon all takings during his employment as such assistant. The facts proved in the case appear fully in the judgment of the Judge President.

King (for plaintiff): The defendants had no just grounds for terminating this contract; the contract is without ambiguity so must stand alone, and it only provides for plaintiff's services as a photographic assistant without any guarantee of skill. Of course, if any artificer enters into a contract for employment the maxim holds *spondes peritiam artis*, but this leaves on the defendants the onus of proving gross incompetency before they can break the contract (Addison on Contracts, 448; *Harmer* vs. *Cornelius*, 5 C. B., N. S., 246; *Kenrick* vs. *Central Diamond Mining Co.*, 3 H. C. 414). Even if the previous correspondence is admitted to explain the contract, plaintiff only guaranteed a good practical knowledge of all the branches. That he possessed this is shown by the evidence of all the customers called, by the photographs in evidence, and the opinion of the experts on them. If some of them are inferior to some of the specimens,

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this is to be accounted for by the difference in surroundings and inferior materials. As regards the work in black and white, defendants are estopped from complaining of this, as they acted, not on plaintiff's representation, but on their own investigation (*Attwood* vs. *Smallwood*, 6 Cl. & F. 232; *Redgrave* vs. *Hurd*, 20 Ch. D. 1). An assistant cannot be expected to take entire charge of a studio. As regards the special acts of negligence alleged, No. 3 took place after the dismissal, so cannot be relied on; No. 1 was not a definite order, nor was it reasonable, as plaintiff had no spare time to take views, and any defects in the book-keeping were condoned by the defendant Hepburn, who said the system employed would do.

Maasdorp, S.G. (for defendants): The term photographic assistant is ambiguous and may be defined by extrinsic evidence, and the conditions and representations under which the contract was made can be proved (Taylor on Evidence, 1058, 1035 & 1038; *Morgan* vs. *Griffiths*, L. R 6 Ex. 70, Stephen's Digest of the Law of Evidence 90, par. *e*). Here the advertisement shows it was a condition precedent that plaintiff should be a first-class re-toucher and worker up in black and white, and none of the experts would say plaintiff's work was first-class. His incompetence was further proved by his slowness in working. Defendants' agents had not examined his work in any sense which would do away with their reliance on his own representation; they had only done so as a matter of superabundant caution.

Cur. adv. vult.

Posteà (March 19).

BARRY, J.P.: The declaration in this case alleges that on the 7th August, 1894, the plaintiff, under a written contract, entered into the defendants' employment as a photographic assistant for three years from the 2nd August, 1894, at a salary of £10 a month, with a commission of five per cent. on all takings in the business, plaintiff agreeing to devote his whole time and attention to defendant's business, which he has faithfully done; but that on the 2nd November last defendants unjustifiably dismissed plaintiff from their service with one month's notice. £384 are claimed as

damages, being £320 for loss of salary and £64 for the commission, with costs of this action.

The defendants plead that at the time the agreement was entered into plaintiff represented himself to defendants as a skilled photographer, and competent to act as a photographic operator and re-toucher, and to work up enlargements of photographs in black and white, and generally to do all work connected with the management and working of a photographic studio; but that plaintiff is not a skilled photographer and is wholly incompetent to do the work of an operator and re-toucher, or to work up enlargements, or to do or perform the work connected with the management and working of a photographic studio in a proper manner.

The defendants further say that by the agreement it was provided that plaintiff shall diligently and faithfully employ himself in the defendants' service, and that, if he fail to do so, defendants shall have the right to dismiss him, and that plaintiff has not faithfully employed himself in defendants' service in the following three respects:

(1.) Shortly after he entered into defendants' service defendants instructed him to take views of the town and streets of Grahamstown and to make specimen enlargements and portraits, and to re-arrange the reception-room with a view to the advertising and development of the business, which instructions plaintiff failed to carry out.

(2.) Defendants instructed plaintiff to keep a proper day-book and to send out accounts regularly together with the completed orders if not paid for in cash, but plaintiff kept his day-book disgracefully and unintelligibly, and very few accounts were rendered.

(3.) Plaintiff failed to carry out certain specific orders, viz., orders from John Ellard in Palapye in British Bechuanaland, and an order by defendant to photograph the members of the Literary and Scientific Institute, which disobedience to orders justified his dismissal.

Plaintiff excepted to the allegations by defendants that plaintiff is not a skilled photographer, and is wholly incompetent to do the work of an operator, and re-touch or to enlarge or to manage a photographic studio, seeing that these special duties formed no part of the written contract. Plaintiff also rejoined that what he did represent to defendants' agents was that he had been a number of years in the

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photographer's business and was then managing a studio at Aberdeen, and was fairly up in all branches of photographic work. That defendants' agents appointed a Mr. Belton to inspect plaintiff's work, and that Belton did so and reported to defendants; and that thereafter defendants contracted to employ plaintiff as a photographic assistant, but made no contract whereby plaintiff was to work the special photographic branch of enlargements, or take the management of a studio. Plaintiff also joined issue with defendants upon their further allegations, and claimed as he now does judgment with costs.

The Court after argument by counsel did not allow the exception, but at the same time gave plaintiff leave to show, after the hearing of the evidence, that the employment by the defendants of the plaintiff as assistant in their photographic business did not in the circumstances require plaintiff to be a skilled photographer, a competent operator and re-toucher, or to be able to work up enlargements, or to manage a studio.

The written agreement relied on by plaintiff sets forth that, the defendants requiring an assistant in their business which they intend to carry on in Grahamstown as photographers, plaintiff applied for the appointment to defendants, who accepted his services for three years as an assistant in the photographic business, plaintiff agreeing to render to defendants at all reasonable times his services as such assistant, and to devote his whole time and attention to the business, in which he shall diligently and faithfully employ himself. In this undertaking plaintiff nowhere in terms agrees to undertake the entire management of a studio, nor does he in terms represent himself as a competent photographic operator and re-toucher, or as able to work up enlargements in black and white; but inasmuch as the term an "assistant photographer" may, like an assistant surgeon, imply professional skill, and even an ability to carry on the business of his principal, during a temporary absence, we did not exclude from the evidence, nor from our consideration, what the defendants' requirements in an assistant were, and which being known to the plaintiff caused him to apply for the appointment.

The circumstances in evidence are these: the firm of "Aldham and Aldham" had carried on a photographic busi-

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ness in Hill Street, Grahamstown, which ultimately in 1894 fell into the hands of the three defendants, Messrs. Hepburn, Ellard, and Jeanes. Jeanes and the mother of Hepburn were at that time carrying on with success a photographic business in Church Square, Grahamstown, under the management of Jeanes, who is unquestionably a very able photographer in all the branches of photography, and Hepburn was employed in the Church Square establishment as an assistant at £15 per month, though, as he himself says, he was not *au fait* at enlarging in black and white. Having purchased the Aldham studio, the defendants inserted in the *British Journal of Photography* the following advertisement—"Wanted for South Africa a first-class re-toucher and assistant operator; one who understands book-keeping preferred. Salary £90 per annum, with board and lodging in principal's own house. Reply with specimens of own operating and re-touching to Wratten and Wainwright, 38, Queen Street, London." Plaintiff, who had since his thirteenth year and for about eleven years been engaged in photography in Aberdeen and London, and was at that time managing the studio of one Daniel Ross in Aberdeen, saw the advertisement and applied for the appointment to Wratten and Wainwright, who referred him to the defendant Hepburn, to whom plaintiff wrote in April, 1894, saying that he had been ten years in the profession, had a good practical knowledge of all the branches besides operating and re-touching, including copying, and had given every satisfaction to his employers, but wanted to go abroad and improve himself. As regards book-keeping, he said he knew as much as would satisfy ordinary requirements, and could easily get into keeping books in any particular way, as he had had a fair education; that he had done outdoor work—groups, houses, and landscapes; and he sent specimen photos, references and letters from customers. To this letter Hepburn, writing from Grahamstown on May 12th, replied that plaintiff would hear from Wratten and Wainwright, whom he had instructed to ascertain whether plaintiff could work up in black and white, as he must have some one who could do so. On June 5th Wratten and Wainwright wrote to plaintiff asking him whether he would undertake working up in black and white, to whom plaintiff replied on June 6th: "During the time that I have been manager

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here I have done all the work of that sort that has come in my way in the course of business, also a few in London, which gave the utmost satisfaction to the parties concerned." To this Wratten and Wainwright on June 11th replied that they were only waiting to hear from Mr. Belton on the subject of working up in black and white. Meanwhile Mr. Belton—sent for this purpose by Wratten and Wainwright—went to see plaintiff in his studio at Aberdeen, where he was at the time of the visit working up in black and white. This work Belton saw, and he was also shown one of plaintiff's finished enlargements, which was entirely his own work. Belton was satisfied with what he saw and reported to Wratten and Wainwright, who wrote to plaintiff on 13th June: "We have heard from Mr. Belton, and have decided to send you out to Grahamstown provided your references are equally satisfactory, and this Mr. Belton informs us will be so; we enclose copy of agreement; if you accept, write us by return." It is evident from this that Belton, seeing plaintiff's specimens, and especially his work in black and white, believed in plaintiff's capacity, and imparted that belief to Wratten and Wainwright, who were satisfied not by plaintiff's account of himself, but by actual inspection of his work, and sent him out as defendants' photographic assistant. Plaintiff's own account is that on arriving in Grahamstown, after having again signed the agreement in the Colony, he was taken to the Aldham studio and placed in entire charge of it, having placed under him by defendants as his sole assistant a Miss Hoggan, who was only qualified to print and tone, and was taught by plaintiff how to sensitize paper. This young lady, he says, was several times absent owing to the illness of her mother, and then plaintiff had sole charge of all the work. A lot of Kaffirs came in from time to time as customers, also some white customers, principally Dutch. Defendants advertised that there would be two free days during which babies would be taken without charge, evidently with the object of inducing the mothers afterwards to become paying customers. Some forty babies appeared and were taken, and their photographs developed and re-touched. With the exception of the camera, which was new, the other accessories were old and much used. Defendants supplied plaintiff with Ilford plates, which are not commonly used

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by first-class photographers, there being no body in the film; the Cadet plate being considered better. Plaintiff says that at first he had to use albumenized paper, which was not satisfactory. He also says that the camera given him to enlarge with was of inferior French make, and that he had to take the enlargements in a dark room, which was not fitted up for first-class work; that in the room in which he ordinarily took his photographs the light was fair but inclined to be yellow, and not as good as that which he had had in Aberdeen; that he complained of the accessories, and that the furniture was old and very shabby; that when he started work some of his time was occupied in carpentering, and that he worked in winter from 9 till 5.30, and in summer from 9 till 6 P.M. The prices fixed by defendants for photographs in his studio were much cheaper than those in Church Square. He says that defendants told him to occupy his spare time in taking views, but that he never had any time available for this purpose, and that defendants never complained of his not taking any views; that the complaint which the defendants had made was his not putting up specimen enlargements in the reception-room, for which he had no time; that the copying was Miss Hoggan's work, and that the burnishing or final process before sending out photographs was done in Church Square; that he kept a day and cash book, which were seen by defendants, who never complained of them, although they occasionally sent for them. As to the allegation of neglect in not carrying out Ellard's order, that order came from the Chartered Co.'s territory two weeks after he had received notice of dismissal, and that he executed it; that he did photograph all the members of the Literary and Scientific Association who came to be photographed, but that he could not complete and combine the group, because, among others, the defendant Hepburn did not give him the opportunity of taking him. The takings had increased from £21 in August to over £30 in November; but whatever be the cause, we think it can scarcely be said that these takings of the business were those of a very flourishing first-class business.

On 2nd November, 1894, defendants, without apparently any previous warning, wrote to plaintiff that the work he turned out was not in accordance with the specimens sent to them, and could not bear comparison; that he could not

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work up enlargements satisfactorily, and that he had misrepresented himself, and in consequence the business had fallen off, and that they must give him notice to leave at the end of a month. This notice plaintiff refused to accept, denying that he had misrepresented himself, or that the business had fallen off, adding that letters from customers showed their approval of his work. It will be seen that in this letter of dismissal no complaint is made of neglect of duty or inattention to instructions, nor is anything said about bad book-keeping; the complaints are that the work is not up to specimens supplied from Scotland, inability to enlarge, and a consequent falling off in the business.

Now as to plaintiff's work being inferior to the specimens which he supplied from Scotland to the defendants, we have these specimens in Court, and also some of plaintiff's work done during his employment. The opinion of Mr. Gillard, a photographer carrying on business at Port Elizabeth, is that the samples of work done by plaintiff here are very fair first-class work, and that with the lens which plaintiff had to work with, he was surprised at such good work at enlarging, especially in the case of the produced enlargement of certain children. The operating and re-touching Gillard pronounced good, even in one case where the copying (Miss Hoggan's work) was bad. In Gillard's opinion the studio is unsatisfactory, and he says that the Ilford plates, with which plaintiff was supplied, were cheap and inferior, and not good enough for first-class work; that the accessories in the plaintiff's studio are bad; that the "Ross's universal lens" supplied to plaintiff is not the best, and is not a quick-acting one. In addition to this we have the evidence of customers, of whom one, the Rev. Mr. Pitt, produced enlargements made by plaintiff, and very satisfactory, from very imperfect originals, at a cost of £3 10*s*. Another customer (a member of the Literary and Scientific Institute), photographed by plaintiff, was quite satisfied with his photograph, which was a good picture. Another customer, Mr. MacDonald, was photographed with his family, and was pleased and never complained. Davidson, a fourth customer, says he was taken by plaintiff and was very much pleased, and in October last, before the date of plaintiff's dismissal, wrote expressing his satisfaction. Plaintiff has also produced a member of a theatrical troupe who had his likeness taken, to

his great satisfaction, by plaintiff in Aberdeen, and whose photograph was amongst the specimens sent to defendants. Against this evidence we have the evidence of three experts, two of them being the defendants Hepburn and Jeanes, and the third a Mr. Green, who, like Gillard, is a photographer practising in Port Elizabeth, and as he has no interest in this case his evidence must have weight. He is of opinion that one specimen of plaintiff's work here is so inferior to the specimens sent from Scotland that he would not think they were done by the same man, but admits that the re-touching of a photograph done here by plaintiff is very similar to that of one of the Scotch specimens. Some of the work done by plaintiff here is, in Mr. Green's opinion, very bad. Mr. Green himself never worked with the Ross's universal lens, and does not like the Ilford plate. With four assistants Mr. Green takes on an average £80 a month at Port Elizabeth. Some of the work done by plaintiff here is, Green says, very good work, and some of the photographs are as good as some of the specimens sent from Scotland; the re-touching in some of those done here is good. We have not the evidence of any of plaintiff's customers condemning his work, but we have the evidence of both Hepburn and Jeanes, and their evidence, although interested, is important. Hepburn is himself an assistant in the business in Church Square belonging to his mother and Jeanes, at a salary of £15 a month, and was instrumental in employing plaintiff, who, he says, was pleased at the light in the studio, as well as at the accessories, and was informed that further accessories in Church Square were accessible to him. Hepburn further says that both he and Jeanes told plaintiff that he would be expected to do his utmost to promote the business, that he would have the entire management of the business, subject to their occasional supervision; that enlargements would be a speciality and chief source of income, but that it was also very necessary to have a stock of good views of the town, which would be advertised; that when asked about book-keeping, plaintiff said he knew enough to answer all requirements. At the end of the first week Hepburn found that plaintiff had not made a proper balance, although the items of expenditure and takings were there, and these he took over into his own cash-book, telling plaintiff that it did not matter. After this, at the end of each

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week, plaintiff paid him the balance which appeared according to his entries, which he never found to be incorrect. Hepburn states that the camera was a good one, and the Ross's universal lens a beauty, which had been for some time in Church Square, where they now, however, use the Dalmyre lens for photographs.

In his opinion the Ross's universal is not slow, but he found plaintiff slow at his general work, and particularly at enlargements; that his first enlargement was not soft enough, and was condemned, but that he made another which he saw and thought would pass, and that it went out to the customer, who did not complain. That in August plaintiff had only twenty-three sitters, five small orders, and three for enlargements and one copy. In September he had twenty-four sitters, seven re-orders, three for enlargements, and one copy; while in October he had fifteen sitters, nine re-orders, two enlargements, and two copies; and in November only seventeen sitters, seven re-orders, and three enlargements. That this work is not a very large amount for such a studio with one assistant; that the babies were not counted as sitters, and numbered about fifty. The plaintiff took a long while in getting them out, thereby defeating their object, which was to get paying orders for more from parents. That plaintiff was told to take the members of the Literary Society singly, with the object of reproducing a group from the individual photographs, of whom Hepburn was one; and, strange to say, although plaintiff is found fault with in not completing the group, Hepburn himself never sat, although, he says, the group could not be complete without him.

Hepburn also instructed plaintiff to take views of the town, but although he never took any, did not complain of his not doing so, though he did speak to him about his slowness of work, at which plaintiff seemed surprised, although he admitted that he was not a rapid worker. That his reason for dismissing plaintiff was his general incompetency.

Hepburn says that although plaintiff never exactly complained of the lens, he said that he had difficulty in getting pictures sharp with that lens, and once said that the lens was slow, which accounted for the badness of some of his work. Hepburn has himself never worked with a Ross's

universal; that, as to the Ilford plate, though it is popular in the Colony, he doesn't like it. That the work done in plaintiff's studio was not at all too much, and that with one lady assistant plaintiff should have done three times the amount of work he did. The earnings during the last two years with four assistants averaged £80 per month. Some of the photographs taken by plaintiff in the Colony are very good, some being as good as some produced as specimens from Scotland.

Jeanes in his evidence says that plaintiff was delighted with the studio and light when he first saw it, and was told to do specimen photos and enlargements for the studio walls, and avail himself of every opportunity to go out and take views of the town, on the strength of which an advertisement was drawn up and submitted to plaintiff, who approved of it.

That before executing enlargements the enlarging apparatus had to be fitted up; that plaintiff appeared at a loss how to do it until helped, and then did not succeed with his enlargements till he had made one or two experiments, which he (Jeanes) did not however examine himself, although he saw the first picture sent out after plaintiff had finished it. Among the enlargements was one of Newey, which was sent out after he had seen it and didn't quite like it. This Newey sent back after plaintiff left. As to the lens, it is not a bad one, and that if plaintiff was a practical man he could have taken the lens out of the studio camera and used it instead; that this studio lens is not slow, nor did the plaintiff complain of its being slow, and with it he (Jeanes) has since taken photos and made enlargements which are good, though taken in plaintiff's studio. That plaintiff preferred Cadet plates, which were supplied to him till the Ilford plates arrived, which he used, and Jeanes was not aware that he ever complained of them, though both Wratten and Wainwright's and the Cadet plates are superior, Jeanes himself not using Ilford's, but Wratten and Wainwright's, which plaintiff did not like as well as the Cadet.

That all the other material in plaintiff's studio was similar to what he himself used, plaintiff being extravagant in his use of fresh developer for every print. Jeanes condemns the work done by plaintiff while in his employ, some of which he considers absurdly bad; and then plaintiff

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shows his ignorance of photography very remarkably in the only outdoor view he took by turning the subjects in such a way as to have a bad light. That plaintiff's takings, averaging £22 per month, are low, and that plaintiff should without difficulty have taken £60; and the result was that the studio was worked at a loss, the books showing that some days he had no sitters at all; and in one instance seven days elapsed without a sitter, and that in reality during the four months there were no sitters during sixty days. Notwithstanding this he took no outdoor views.

In Jeanes's opinion a photographic assistant is a man who should be well up in all branches of the profession, and should be competent to take the principal's place during his absence. That plaintiff is not up in all branches of the profession, while in some he is very incompetent; that his work here comes nowhere near the specimens of photos sent out.

In my opinion the evidence shows that plaintiff was engaged not as the sole manager of a photographic business, such as that upon which he was afterwards employed, but that he voluntarily undertook the work, and endeavoured to carry on the business in Hill Street with success, and was never negligent in his work. This absence of negligence is, I think, confirmed by the letter of dismissal, which only imputes incompetence.

As to inability to keep books, it is quite clear that plaintiff never pretended to be a good book-keeper, but thought he could adapt himself; and when it was found what he did do in the way of book-keeping, his work was accepted and any deficiency condoned.

The non-completion of the group of the members of the Literary and Scientific Institute cannot be imputed to the plaintiff after the fact that Hepburn himself, a member, was a cause of its non-completion. That plaintiff was a slow worker I think there is evidence, and that he was probably not a first-class business man there is also some evidence; but these, if defects, are not defects which would justify the defendants in dismissing the man whom they only engaged as an assistant.

As such assistant I think that plaintiff should have been reasonably well up in all the branches of photography, and even competent temporarily to take the principal's place;

but plaintiff did not contract to be himself the principal, which implies a business capacity in addition to that of a reasonable knowledge of his profession all round; and although Hepburn, himself an assistant, has shown that an ability to enlarge photographs is not necessarily the province of every assistant, I think that the term photographic assistant in the present contract implies an ability to enlarge; but an ability to enlarge under supervision, also an ability to operate under supervision, and an ability to retouch.

This ability was proved to the satisfaction of defendants' agent in Scotland after inspection of his work, where the defendants refused to accept plaintiff's account of himself unless tested by proof of actual work, which was seen and approved of by competent experts.

As to work actually done by plaintiff in Hill Street, there is not evidence to satisfy me that it was of such a character as to show that he misrepresented his capacity by the specimens produced in Scotland. It is not now pretended that those specimens were not his own work. The evidence proves they were his work, and if the work done here is not in every respect equal to the best done in Scotland, that is to be accounted for by the material and appliances used here, and the fact that he was forced to use the services of an assistant printer whose work was not always first rate. Whatever Jeanes may himself be able to do with the Ross universal lens, I am forced to the conclusion from the evidence not only that the plaintiff complained of that lens, but that it was comparatively slow, and this slowness accounts to a great extent for any defect which may appear in his photos. The failure to secure large takings, which in reality appears to me to be the real cause of the dismissal, arises from circumstances for which the defendants are not justified in dismissing the plaintiff. In the first place, the baby venture was a mistake for which the plaintiff is not responsible, nor is the group venture, and these ventures must have occupied a considerable portion of plaintiff's time.

Again the absence of sitters during seven days cannot without further proof be attributed to plaintiff's neglect or inability.

That no customer has been produced who is dissatisfied

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with plaintiff's work is a circumstance as favourable to him as the presence of several customers who approved of his work. I cannot moreover think that a photographic business where Kaffir customers are invited, and the rates are cheaper than in Jeanes's studio in Church Square, is a business where first-class and only first-class photographic work can be expected to be turned out. The work that was done was always accessible to defendants, in whose studio every photograph before it was sent out must have passed in order that the final process of burnishing might be supplied. In these circumstances plaintiff is entitled to damages. Without going into any elaborate calculation, seeing that plaintiff is capable of doing professional work, and will probably be able to obtain other employment before the expiration of the time contracted for, we cannot give him the whole amount of the salary or commission estimated to be earned, and think that £100 should satisfy his claim. The judgment of the Court will be for £100 damages to plaintiff, with costs.

JONES, J., concurred.

QUEEN *vs.* DERRINGER.*

Sect. 73, *Act* 28 *of* 1883—*Sale of Liquor.*

Where liquor was sold to a child in a bar without the knowledge of the proprietor, but by an assistant whom he had left in charge. Held, *that the proprietor was properly convicted of a contravention of sect.* 73, *Act* 28 *of* 1883.

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Queen *vs.* Derringer.

Appeal from a decision of the Resident Magistrate of King William's Town.

Albert Derringer, a hotel keeper in King William's Town, was accused of contravening par. 6, sect. 73, Act 28 of 1883, as amended by Act 22 of 1894.

Par. 6, sect. 73, Act 28 of 1883, makes it an offence for the holder of a licence to "sell or knowingly permit to be sold to any person apparently under the age of fifteen

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* Before MAASDORP, J., Circuit Court Judge.

years any description of spirits," and the amending Act adds the words, "or deliver or supply or knowingly permit to be delivered or supplied," after the words "permit to be sold." From the facts, which were admitted, it appeared that Albert Derringer was the holder of a liquor licence for his premises in King William's Town, and that in his absence a sale of threepennyworth of Cape brandy took place to a child of seven years old by his assistant, who had been left in charge of the bar.

Accused was found guilty and a fine of £2 imposed.

Sampson (for appellant): The section makes it an offence to sell or knowingly permit to be sold; if it were not for this latter clause, the knowledge of the agent would be the knowledge of the employer, and would bind him, but the word "knowingly," which only occurs here and in par. 3 of this section, must have some meaning, and it clearly implies that it is not an offence either to sell or permit to be sold, unless it be proved that it was done knowingly; otherwise the clause is mere surplusage.

King (for Crown) was not called upon.

MAASDORP, J.: The argument of counsel for respondent might require further consideration, were it not that it covers only a portion of the case, and does not apply to all the alternative clauses with respect to which the charge has been framed. Section 73 provides that it shall be an offence for the holder of a licence to "sell or knowingly permit to be sold to any person apparently under the age of fifteen years any description of spirits, or permit or suffer any such person to drink any such spirits upon his premises."

Now the clauses in this section are in the alternative, and each alternative clause makes a separate offence, consequently the charge can be divided, and the words "knowingly permit to be sold" need not have been introduced at all if the framers of the charge knew that an actual sale could be proved. The Magistrate, as is proper in charges consisting of separate alternative clauses, has found which clause it is that accused has contravened, and finds that there was an actual sale by a woman occasionally employed by the accused as a saleswoman in his canteen; this is equivalent to a sale by the proprietor himself, and

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consequently, if all the clauses containing the word "knowingly" were struck out, the charge would still be sufficiently stated and proved. A selling by any person placed in charge is a selling by the proprietor himself, and this broad rule of law cannot be abrogated by the mere fact of there being an alternative clause in the same section making it an offence "knowingly to permit to be sold." It is not necessary to give any decision with regard to the meaning of this latter clause; I will only say that in my opinion the legislature could not have meant to lay down that a proprietor is to be free from liability if liquor be supplied to a child by his assistant when he is absent. The word "knowingly" may mean that the proprietor's duty is to see that his assistants act in accordance with the law, and that he is responsible for their actions. The evidence in this case shows that a sale took place, and the appeal must be dismissed.

HAY *vs.* ROBERTSON.*

Libel—Defamatory words.

It is not defamatory to say of a newspaper that "it consists mainly of cuttings from other papers," or to suggest that it is "run on petty or personal lines."

1895. March 27. — Hay *vs.* Robertson.

This action was tried at the King William's Town Circuit Court before MR. JUSTICE MAASDORP, Circuit Judge. Mr. George A. Hay, editor and proprietor of the *Cape Mercury*, claimed £1000 damages from Mr. J. Donald Robertson on account of an alleged defamatory paragraph published by him in the *Farmers' Chronicle*. The summons standing for declaration was as follows:—

1. The plaintiff resides in King William's Town, and is the proprietor and editor of a newspaper called the *Cape Mercury*, which for many years has circulated in King William's Town and throughout the Colony.

2. The defendant also resides in King William's Town.

3. In the issue of a newspaper called the *Farmers' Chronicle*, printed and published at Cathcart, in this Colony,

* Before MAASDORP, J., as Circuit Court Judge.

on February 15th, 1895, the defendant caused to be printed of and concerning the plaintiff, and of and concerning the plaintiff in his capacity as a journalist and editor of the *Cape Mercury* newspaper, certain false, defamatory, and malicious statements, to wit: "Mr. James Hay is down from Johannesburg, and it is fully rumoured in town that he will go back accompanied by Mr. George Hay, the present editor of the *Cape Mercury*. The *Mercury* is to be run by the comps. themselves for a time to see how it pays, and as the expense of an editor is thus saved and the weekly (? weakly) *Mercury* consists mainly of cuttings from other papers, this should not be a difficult matter. There is a lesson to be learnt from all this, and it is, 'Don't run your paper on petty or personal lines, or you will have to take a back seat, or else quit altogether.'"

4. The defendant meant thereby that the plaintiff's newspaper, called the *Cape Mercury*, was and is principally composed of matter taken over or cut from other newspapers, and that the said newspaper was devoid of original matter, and therefore was not, and is not, deserving of the support of the public.

5. The defendant further meant that the plaintiff was and is not a competent journalist, thereby intending to damage the plaintiff in his profession as a journalist and to damage the circulation of the said newspaper, the *Cape Mercury*.

6. The defendant further meant that the plaintiff was obliged to quit King William's Town and to abandon his editorship of the *Cape Mercury* in consequence of the manner in which he had conducted the editorship of the said newspaper, viz., on petty and personal lines.

The defendant excepted to this summons as bad in law, inasmuch as the words set forth in par. 3 were not in themselves defamatory and did not reasonably justify the innuendos placed upon them.

King (for defendant) supported the exception.

Tamplin (for plaintiff): The paragraph is defamatory in two ways; first, there is a statement as to how the *Mercury* is to be conducted in future, whereby the circulation of the paper will be diminished; and secondly, it is suggested that the plaintiff's conduct of the paper has been such as to compel him to leave King William's Town. The first affected

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the value of the plaintiff's property, the second his reputation as a journalist. (Starkie on Libel, vol. 1, pp. 26 & 135; Odgers on Libel and Slander, pp. 21 & 64, 65.)

MAASDORP, J.: In this case the plaintiff sues the defendant in an action for damages for libel alleged to be contained in a paragraph published in the *Farmers' Chronicle*, and the question now is whether this paragraph contains any defamatory or libellous matter. To determine this we must first take the paragraph sentence by sentence and then regard it as a whole, as a paragraph in its entirety sometimes has a different meaning to that which its various sentences bear when taken separately. The paragraph commences: "Mr. James Hay is down from Johannesburg, and it is freely rumoured in town that he will go back accompanied by Mr. George Hay, the present editor of the *Cape Mercury*." This must be regarded as being merely a piece of news about the editor of the *Cape Mercury*, and as showing an interest in his movements; there is nothing in that sentence that can be held to show malicious intention. It goes on—"The *Mercury* is going to be run by the comps. themselves for a time to see how it pays, and as the expense of an editor is thus saved—" The editor having left, it seems to be suggested by the *Farmers' Chronicle*, or the writer, that there was no editor to carry on the work. If he had said there was no competent editor, it might be surmised from this that the paper was to be left in the hands of managers who would not maintain its circulation, but this is by no means a necessary deduction from the words used, nor, indeed, are they relied on by the plaintiff as a serious ground of complaint. Then—"and as the weekly (? weakly) *Mercury* consists mainly of cuttings from other papers, this should not be a difficult matter." Is this a defamatory statement to make? If statements of this class were held to be defamatory, I think our Courts of Justice would be daily engaged in trying cases of libel between newspapers or between newspapers and the public. What is the meaning of "consists mainly of cuttings from other papers"? We all know what the constitution of a newspaper is: there is the leading article, the sub-leader, and news derived chiefly from other papers; and it is in the fact that they give news from all parts of the world from other papers that the value of a

newspaper consists. It is not an uncommon practice, indeed, for many people to skip the leading article and read only the news. I do not think that there is any special meaning in the word "cuttings"; and altogether there is nothing libellous or malicious in the paragraph, nor does it expose the editor to contempt or odium.

After setting out the above statement as facts, the paragraph proceeds to certain deductions from them: "There is a lesson to be learnt from all this, and it is, Don't run your paper on petty or personal lines," &c. I cannot agree with one view that has been suggested, viz., that this is merely a piece of advice presented to the editor of the *Farmers' Chronicle* by his correspondent. I take it to mean this, that Mr. Hay did run his paper on petty or personal lines. But is this a libellous reflection on Mr. Hay? It is only an opinion expressed by the correspondent of the *Farmers' Chronicle*, and an opinion expressed in not very malicious terms. An opinion was expressed, and that opinion does not seem to me, in the wording of it, to express any more than a little light criticism, and possibly to amuse its readers at the expense of the other paper. Besides, a newspaper editor is in a position to give as good as he receives, and I think plaintiff should learn to take criticisms of this harmless nature as well as to give. Then as to "taking a back seat," that means not standing in the front rank of influence or ability. Well, we cannot all be leaders, and some of us must take a back seat. I must hold that this last sentence, like all the rest, contains nothing in it on which to found an action for libel. Looking, too, at the paragraph as a whole from beginning to end, I cannot consider it defamatory or actionable. It is merely an expression of opinion, which may be wrong, but an expression of opinion which I do not consider couched in a malicious or defamatory manner. The exception must, therefore, be held good, and the summons dismissed with costs.

QUEEN *vs.* ATTWELL BROS.*

Sect. 25, *Act* 28 *of* 1883—*Sale of Liquor—Licence.*

Where forwarding agents at East London received a consignment of intoxicating liquor for a Johannesburg firm, and, acting on instructions from this firm, instead of forwarding the liquor, handed it to a broker at East London with instructions to sell, and gave cession and received the purchase-money. Held, *that this was a contravention of sect.* 75, *Act* 28 *of* 1883.

Q. *vs.* Thesen, 7 J. 105, *distinguished.*

1895. April 1.

Queen *vs.* Attwell Bros.

Appeal from a decision of the Resident Magistrate of East London.

The accused were charged with contravening sect. 75, Act 28 of 1883, in that on or about the 2nd March and the 12th April, 1894, at East London they did wrongly and unlawfully sell, deal in or dispose of, through Messrs. Chambers & Poole, licensed brokers, to the firm of Theodor Dreyfus certain intoxicating liquor, to wit on the 2nd March, 1894, 20 cases containing 144 gallons of stout, and on the 12th April, 1894, 25 cases containing 180 gallons of stout, without a licence as by law required.

The section provides—

"Any person who shall contrary to the provisions of this Act sell, deal in, or dispose of intoxicating liquors without a licence, or sell or offer, or expose for sale any such liquors at any place where he is not authorised by his licence, shall upon conviction be liable to (for the first offence) a fine not exceeding £25 . . . ."

From the evidence it appeared that the accused, Alfred and Edward Attwell, were in partnership as landing and forwarding agents in East London, and held a general dealer's licence, but no wholesale or retail spirit licence. In 1894 they were acting as landing and forwarding agents for Collins, Kneller & Co. of Johannesburg, and in that capacity and on their behalf received the stout in question. In the ordinary course this stout would have been forwarded to Johannesburg, but while it was in bond at East London, Attwell Bros. received from Collins, Kneller & Co. a telegram: "Sell all stout at prices named."

* Before MAASDORP, J., as Circuit Court Judge.

On receiving this telegram they employed Messrs. Chambers & Poole, licensed brokers (who also have no spirit licence) to effect a sale, the accused fixing the price, and afterwards agreeing to a modification in the price, but not personally interfering in the negotiations for sale. By these brokers a sale was effected to Messrs Dreyfus & Co., and the stout was transferred to them in bond, the transfer being signed "*Per* Collins, Kneller & Co., E. H. Attwell," and the price being paid to accused. The accused were found guilty and sentenced each to a fine of £12 10*s.* or fourteen days' imprisonment.

Sampson (for appellant): Accused were not the actual sellers, they were forwarding agents for Collins, Kneller & Co., and in the ordinary course would have forwarded the stout to Johannesburg; when they received different instructions they merely handed over the goods to Chambers & Poole, and are no more to blame than a carrier who might convey the goods. They signed the transfer merely as forwarding agents; the real sellers were Chambers & Poole. *Q.* vs. *Thesen*, 7 J. 105; *Q.* vs. *Grief*, 3 H. C. 363.

Burke (for Crown): The accused have not shown that they have a licence or that they come under any of the exceptions in sect. 2 of the Act. Consequently, as the sale was by them, the money being paid to them and receipts given by them, the conviction must stand.

MAASDORP, J.: In this case accused is charged with contravening sect. 25, Act 28 of 1883, in that he sold a certain quantity of intoxicating liquor without having a licence as by law required. I do not think the question need be complicated by the arguments introduced based on the existence of a foreign principal; no privileges are given to foreign firms to trade in this country, such as would entitle their agents to an acquittal if a sale without a licence is proved to have taken place. Sect. 75 prohibits any sale of intoxicating liquors without a licence; the question is, did such a sale take place, and by whom? The evidence in this case shows that the property in the intoxicating liquor in question was first of all vested in Collins & Co., and that it subsequently was vested in Dreyfus & Co. What was the nature of the transaction by which the property passed, and

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did it vest in any one in the meantime? It is admitted that the property passed from Collins to Dreyfus & Co. by sale; the only question then is, who sold? From the evidence it is quite clear that there could have been no sale, and that the property could not have passed unless there had been a sale by Attwell Brothers. They put in a document showing a cession for valuable consideration to Dreyfus & Co., but say, "We only sold in a certain capacity, viz., as agent." This does not really create any difficulty, as in the case of a sale of intoxicating liquor it is very seldom that the actual sale is effected by the proprietor himself; in a hotel, for instance, the proprietor frequently appoints a manager, who in turn appoints a barman, and if the barman effects a sale under conditions that are illegal, and the question arises who is responsible, the answer is, all the parties are made liable, both barman, manager and proprietor.

The case of *Q.* vs. *Thesen* has been referred to, and there is no doubt that if Attwell Brothers had acted as Thesen did, they would not have infringed the law. Thesen refused to sell the liquor himself, and, handing it over to another agent, gave him no instructions to sell, and so was free from any transgression of the law. In the present case even if the brokers Chambers & Poole had sold for Attwell, and Attwell had stood completely aside (though this is not the view of his action which I take from the evidence), the brokers would still have sold under Attwell's direction, and he would have been liable for their action.

In another case referred to, *Q.* vs. *Grief*, the agent was protected by the principal's right to sell; here there is no such protection, as neither Collins nor Attwell had any such rights.

It may be said that the brokers who sold for Attwell are the persons liable; about this I will say nothing, except that even if this be so it does not furnish a defence for Attwell. There is some authority for saying that in cases of this kind where the Crown have chosen one party to a transaction to proceed against they are precluded from proceeding against any of the others, but about this again I express no opinion. The appeal will be dismissed.

MAGISTRATES' CASES REVIEWED.

QUEEN *vs.* MAFENGA.

Act 27 of 1882—Summons.

1895. Feb. 12. — Queen *vs.* Mafenga.

MAASDORP, J.: Accused in this case was charged before the Resident Magistrate of Aliwal North with the offence of contravening sect. 5, sub-sect. 3, Act 27 of 1882, in that he wilfully broke a pane of glass. This sub-sect. makes it a crime *inter alia* wantonly and mischievously to throw stones or other missiles, but makes no mention of the offence with which the accused was charged; the conviction must therefore be quashed. I may add that even had he been charged under the proper section there is not evidence enough to support a conviction, but the reason for quashing it is not this, but the fact that the summons is defective.

QUEEN *vs.* APRIL AND OTHERS.

Perjury—Indictment—Evidence.

1895. Feb. 14. — Queen *vs.* April and others.

JONES, J.: In this case, which came before me as judge of the week, April and two other prisoners were charged in the same indictment with the crime of perjury and found guilty. This in itself is irregular, as the act of perjury being a separate act, each prisoner ought to be charged separately. But on looking at the evidence I find that the perjury consisted in making a false statement as to the date on which the prisoners entered into employment; their master on the same occasion made an even more erroneous statement as to this date, yet he is called as a witness against the three prisoners, and on his sole testimony they are convicted. To constitute perjury a false statement must be made wilfully. It is evident that the wrong date given by the prisoners was simply a mistake; it was not in any sense intentionally false, and consequently the conviction must be quashed.

QUEEN *vs.* ADAM PIETERSEN AND BOOY.

Evidence—Theft.

1895. March 12.

Queen vs. Adam Pietersen and Booy.

BARRY, J.P.: This case came before me for review. The two prisoners were charged before the Resident Magistrate of Philipstown with theft of three boxes of buttons and a quantity of linen, the property of one Schroeder, a storekeeper, and were found guilty. The evidence against them was that of a constable, who said that on February 12th Pietersen brought Booy to him and charged him with having been caught the night before jumping out of a window from Schroeder's shop. Booy was, when handed to the constable, in possession of the stolen property, but said that it had been given him by Pietersen, whom he had found stealing it from the shop. Another witness deposed that on the evening before the theft took place he had seen Pietersen lurking in the vicinity of Schroeder's shop.

The Magistrate in his reasons said that he was not influenced in Pietersen's favour by the fact of his having given Booy into custody, as both prisoners when arrested were under the influence of drink, and that he considered Pietersen's being seen near the shop the night before created a suspicion against him. Now of Booy's guilt there is no doubt, but there is no evidence to convict Pietersen, as Booy's statement was merely made to the constable and not repeated on oath, while the fact of his giving Booy into custody should have raised some doubt of his own guilt. Pietersen's conviction and sentence will be quashed.

QUEEN *vs.* RELENGA.

Procedure—Remitted Case.

1895. March 12.

Queen vs. Relenga.

JONES, J.: This case came before me as judge of the week. Accused was charged with theft of a plough, and a preliminary examination was held by the Resident Magistrate of Komgha and the proceedings sent to the Solicitor-General. The case was remitted by him to the Magistrate under Act 43 of 1885, accompanied by the usual form, calling the Magistrate's attention to sect. 29, Act 3 of 1861,

which enables the Magistrate to read over the evidence taken at the preliminary examination instead of recalling the witnesses. But when the prisoner was arraigned and pleaded "not guilty," the Magistrate did not either read the evidence or recall the witnesses. It has been held that in cases remitted under Act 43 of 1885, it is essential to read over the evidence in the presence of the prisoner, and that the Magistrate cannot omit this, even at the request of the prisoner or his agent. The evidence in this case would have justified a conviction, but owing to this grave informality the Court must quash the conviction and sentence.

EASTERN DISTRICT COURT REPORTS.

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PART IV.

Re PRINCELOW.

Curator bonis—Interdict—Prodigal.

Rule nisi granted on an application for the appointment of a provisional trustee to a woman who through advanced age was incapable of managing her affairs, and who showed a disposition to part with her property recklessly.

1895. May 15.

Re Princelow.

This was an *ex parte* application for the appointment of a curator provisionally to take charge of the property of Maria Princelow pending the final appointment of a *curator bonis*.

The petition of Peter W. Princelow and H. Grobbelaar stated that one petitioner is the son of A. C. Princelow, deceased, and his wife Maria Princelow, and that the other, Grobbelaar, is entitled by purchase to the shares of various sons and daughters of the said A. C. Princelow, who were joint-heirs under the mutual will of him and his wife; that Maria Princelow is eighty-nine years of age, blind and almost deaf, and quite incapable of managing her affairs; that in January 1894 Maria Princelow was asked by her

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son Johannes Princelow, who has no means, to sign an accommodation note for £283, and did so on the persuasion of another son Wilhelm; that since that date Wilhelm got possession of the title-deeds of a farm in the estate, and informed Peter W. Princelow that he intended to effect a loan to a considerable amount on the farm, as he said, for the purpose of making a fence and of meeting current expenses; but the petitioners stated that the fence would only cost £30, and that the rent from the estate was sufficient for the support of Maria Princelow; and that they believed the said Maria Princelow did not understand and was incapable of understanding the nature of these transactions.

Blaine for applicants: A curator will be appointed to the property of a person not capable of managing his affairs, although there is no evidence of insanity. This order has been made on an *ex parte* application. *Re Filmer*, Buch. 1875, 2; v. d. Keesel, 164. The *Master* vs. *Lehman*, 4 E. D. C. 308.

Per Curiam: An order will be granted appointing Mr. F. H. Jones, of Queenstown, *curator ad litem* to Maria Princelow, and an order made returnable on June 6th calling on her to show cause why she should not be declared incapable of managing her own affairs, and why a trustee should not be appointed; this order to operate in the meantime as an interdict against her mortgaging or otherwise disposing of her estate.

Queen *vs.* De Keyter.

Act 27 of 1882—Police Offences—Abusive Language—Public Place.

In a charge of contravening s. 10, Act 27 of 1882, by using insulting and abusive language in a public place, the threat which is the subject of the charge need not be addressed directly to the person against whom it is directed.

1895. May 20. — Queen *vs.* De Keyter.

Appeal from a decision of the Resident Magistrate of Aberdeen. The accused, Daniel de Keyter, was found

guilty under a charge of contravening s. 10, Act 17 of 1882, in that on the 7th of February at Aberdeen he wrongfully and unlawfully used towards one Daniels insulting and abusive language in the street of Aberdeen with intent to provoke a breach of the peace, or whereby a breach of the peace might be occasioned. Before the Magistrate, James Daniels stated that on February 7th he was talking to one Naudé before the pound-kraal in Aberdeen. Accused came up and spoke to Naudé in his presence. Naudé said, "Why do you interfere with the man?" and accused went on, "If you are d——d afraid of him, I'm not; I'll kick his posterior." He did not name witness, but witness was the only man present. Naudé said that on the day in question as he was talking to Daniels accused came up and said, "My cow is gone and many will be glad about it." Witness said, "Why do you make insinuations about the old man?" and then accused made use of the words complained of. Both complainant and accused are butchers. Accused gave evidence, stating: "I did use those words to Naudé, not to complainant; I did not mean complainant."

Hutton for appellant: It is nowhere clearly proved that the words were used in a public place; this proof is necessary. *Q.* vs. *Stephenson*, 2 H. C. 428. Nor is there any evidence that the words referred to Daniels; this is alleged and must be proved.

Maasdorp, S.G., for Crown, was not called on.

BARRY, J. P.: I think there is sufficient evidence that the words were used in a public place and in the street of Aberdeen as alleged in the indictment. The words were plainly abusive and tending to a breach of the peace on the part of Daniels. Taking the evidence as a whole, I am of opinion that the words referred to Daniels, the only thing urged against this view is that one witness said he could not swear that they referred to him. I am inclined to think that the reference to Daniels in the indictment may be taken as mere surplusage, but on this, however, I express no opinion. The appeal will be dismissed.

JONES, J.: I concur; I have no doubt that the words referred to Daniels, and were tending to a breach of the peace, and were spoken in a public place.

LOESCHER *vs.* PELSER, KRUGER & CO., AND VAN DER HEEVER.

Debtor—Fraudulent Alienation—Common Law in Insolvency —Exception.

Where an action is taken at common law to set aside an alienation as made in fraudem creditorum, *it is not a sufficient defence to show that the debtor's estate has never been sequestrated.*

1895. May 20.

Loescher *vs.* Pelser, Kruger & Co., and Van der Heever.

This was an argument on exception in an action taken to set aside an alienation made by one Louis Kluger to the defendant. The plaintiff's declaration was as follows:—

1. Plaintiff lives in Aliwal North, and the defendant Van der Heever is an attorney at Burghersdorp, and the other defendants are merchants at Burghersdorp, trading as partners under the name of Pelser, Kruger & Co.

2. In November 1894, plaintiff was a creditor of one Louis Kluger in the amount of £7 7*s.* 7*d.*, and was also a creditor of Henry Kluger, his brother, in the amount of £9 12*s.* 10*d.*

3. The defendants were each and both of them at the said times creditors of Henry Kluger and Louis Kluger.

4. On the 4th November, 1894, when Henry and Louis Kluger were in insolvent circumstances, and when their liabilities fairly calculated exceeded their assets fairly estimated, and when they were unable to pay their debts, Louis Kluger ceded, alienated, and delivered to the defendants on his own account, and on that of Henry Kluger, certain cattle, namely, seven of his own and eleven of Henry Kluger's.

5. At the time of this alienation the defendants were privy to the facts that the Klugers were unable to pay their debts, and that the said alienation was in fraud of the creditors of Henry Kluger.

6. On 17th January, 1895, the plaintiff got judgment in the Resident Magistrate's Court at Burghersdorp against Henry Kluger for £9 12*s.* 10*d.* and £1 8*s.* 4*d.* as costs, and thereafter took out a writ of execution to which a return of *nulla bona* was made.

7. On 22nd January, 1895, the plaintiff got judgment

against Louis Kluger for £7 7*s.* 7*d.* and £5 16*s.* 4*d.* costs, and took out a writ of execution, to which a return of *nulla bona* was made.

8. The costs of the writ against Henry Kluger was 12*s.* 6*d.*, and against Louis Kluger £1 2*s.* 6*d.*

9. By reason of the said wrongful alienation the plaintiff has been deprived of the settlement of his just claims, and says that it was made in fraud of creditors.

10. Wherefore the plaintiff prays that the said alienation be declared null and void, and that the property alienated shall be declared executable.

To this declaration the defendant Van der Heever excepted as disclosing no cause of action, the ground relied on being that it contained no statement that the debtor's estate had been sequestrated or judicially pronounced insolvent.

Sampson, for defendant, in support of the exception: The Insolvent Ordinance cannot be applied as the debts are under the amount necessary for sequestration. An action at common law for fraudulent alienation can only arise if there has been sequestration, or else a *missio in possessionem*. *Trustees of Burgher* vs. *De Leeuw*, 1 Men. 514; *Trust of Smith* vs. *Smith*, F. 19, Voet 42. 8. 3., 42. 8. 17. A vigilant creditor acting before the *missio* exists is protected; *nihil doli creditor facit qui suum recipit.*

Blaine for plaintiff: The declaration merely alleges an alienation *in fraudem creditorum*, and this comprehends many forms of fraud which would under Roman law nullify an alienation made even before a *missio in possessionem* existed. Hunter's Roman Law, p. 881.

BARRY, J.P.: We cannot allow this exception; the declaration alleges fraud, and does not specify what form of fraud is relied on; that will be shown by the evidence, and without the evidence before us we cannot decide whether the defendant is guilty of what is legally fraud or not. The exception will be dismissed with costs.

JONES, J., concurred.

QUEEN *vs.* MAYBE AND HINE.

Act 28 *of* 1883—*Liquor Licensing Act—Sale of Liquor—Agency.*

Where a contractor opened a store at his works where he did not himself reside, and placed a shopman in charge of it, and the manager of the works was left temporarily in charge of the store by the shopman, and in his absence sold intoxicating liquor in the store, which was unlicensed, Held, *that these facts did not make him an agent of the contractor so as to make the contractor liable for a breach of the Licensing Act.*

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Queen *vs.* Maybe and Hine.

Review of a decision of the Resident Magistrate of East London.

The accused, Arthur Maybe, a member of the firm of Maybe and Hine, contractors, was charged with the crime of contravening s. 75, Act 28 of 1883, in that on or about the 25th and 27th days of April, 1895, and at Gombie Bridge Works, he did sell, deal in, or dispose of intoxicating liquors or cause to be sold, dealt in, or disposed of by their agent or employé, Harold T. Stapleton, certain intoxicating liquors without a licence, to wit on the 25th April, 1895, one bottle of Cape brandy to a Hottentot, by name of William or Willem, for the sum of one and sixpence; on the 27th April, 1895, two glasses of brandy to one Booy for the sum of sixpence, one bottle of brandy to William or Willem aforesaid for the sum of one and sixpence, and one glass of brandy to one Thomas.

The evidence as to the sales was somewhat contradictory, being mainly that of traps, who swore they had employed William to buy brandy for them, and that the alleged purchases by him, Booy and Thomas, had taken place in their presence, and were made from Stapleton, while William, being called by the Crown, denied having ever made any such purchase. Harold T. Stapleton, however, called for the defence, admitted that on April 27th he had taken charge of the store belonging to the accused, and

had then supplied one bottle of brandy to a native for one and sixpence. After this the police searched the store and found a cask containing forty gallons of brandy.

Stapleton further deposed that he was manager of works to Messrs. Maybe and Hine, who were contractors for Gombie Bridge. Maybe resided in East London, and Hine in the Transvaal. From eighty to ninety natives were employed in the works; they frequently worked in the water, and those who so worked, and the night shift, got a glass of brandy given to them; this was necessary, and involved keeping a large quantity of liquor on the premises. A Mr. Jones was storekeeper, and at his request he (Stapleton) had taken charge of the store for a while on April 27th; while so in charge he had sold a bottle of brandy to Gogo, a native, being asked to do so by the purchaser. When Jones heard of this he said it was wrong and that he would return the one and sixpence to Gogo; he had not been in the store on April 25th. Arthur Maybe (the accused) swore that he had only been at the works for a day or two at a time, and was not there on April 25 or 27. He knew nothing of the sale of the brandy but had instructed Jones not to sell liquor, but to give some occasionally to the men. A native, Thomas, employed on the works was called for the Crown, and deposed that he had got brandy at Maybe's store on credit, the price to be deducted from his wages, and that this was the usual custom.

King (at the request of the Court) argued the case for the accused:

To make Maybe liable for Stapleton's act some agency, express or implied, or some connivance must be proved. This is not the case of an offence committed in a licensed house, where agency might perhaps be implied, but only implied on the principle that the holder of a licence must prevent that which the Licensing Acts forbid from taking place on his licensed premises. The general liability of a master for his servant's criminal act is much narrower. *Newman* vs. *Jones*, 17 Q. B. D. 132; *Bond* vs. *Evans*, 21 Q. B. D. 249; *Chisholm* vs. *Doulton*, 22 Q. B. D. 736; *Q.* vs. *Ralli*, 7 E D. C. 193; *Q.* vs. *Murtria*, 3 H. L. 165.

Maasdorp, S.G., for the Crown: The mere fact of forty

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gallons of brandy being in the shop shows what the intention of the proprietor was; besides, there is evidence of the illegal arrangement that liquor should be given and the price deducted from the wages afterwards.

Cur. adv. vult.

Posteà, June 18—

BARRY J.P.: In this case on review from the Resident Magistrate of East London, the accused Maybe and Leonard Hine were apparently according to the record each charged with contravening s. 75, Act 28 of 1883, in unlawfully selling liquor without a licence through Harold Stapleton to one Booy and to one William. The record states the accused Hine is resident in the Transvaal, and there is nothing to show that he was present at the trial. Maybe was present, and the record states Mr. Attorney Stone appears for the accused, and that Maybe pleads "not guilty." The evidence shows that there was a sale by one Stapleton on the shop premises of the accused of some brandy to Booy and William. This Stapleton had been left in charge of the shop for a short time by the shopman Jones who had charge of that shop for Maybe and Hine, who are apparently partners in the business. Maybe was not there on the day of the sale, nor was Hine who was in the Transvaal. It appears that a number of native workmen were employed by Maybe on some work in the Kei River, and it was thought that it would be desirable to give these workmen when cold some brandy occasionally without charge. With this object some brandy was kept in the shop by Jones who never authorised Stapleton to sell brandy, but Stapleton was left in charge of the shop by Jones for a short time. During Jones' absence Stapleton sold a small quantity of brandy to two of these employés; Jones on his return hearing this, condemned Stapleton's act. The Magistrate appears to have held Maybe at least liable for Stapleton's act; as the record stands the conviction may include Hine, but this is not clear. Hine having been absent could not be tried, and consequently a conviction of him in his absence would be illegal. As to Maybe there is no evidence whatever that he either expressely or impliedly authorised the sale of this liquor; he cannot therefore be

convicted, and the conviction and sentence must therefore be quashed, and a verdict of not guilty entered as to Maybe.

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JONES, J., concurred.

GREATHEAD AND CHEW *vs.* STANTON.

Medical Fees—Consultation—Contract.

The practice among physicians and surgeons of charging consultation fees at a rate in excess of their ordinary visiting fees is not merely a custom of which the validity depends on its reasonableness or on the patient's knowledge of it, but in the absence of any special agreement whoever calls in a second physician must be taken to agree to pay the ordinary fee chargeable for a consultation.

When a patient's friends asked a surgeon to attend a case with their ordinary medical attendant, or to visit it when he thought necessary, and in consequence the surgeon by arrangement with the ordinary medical attendant paid two visits a day for the next twenty-four days, a jury held that he was not entitled to full consultation fees for each of these fifty visits.

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Greathead and Chew *vs.* Stanton.

This was an action tried before Mr. Justice JONES and a jury.

The plaintiffs, Drs. Greathead and Chew, medical practitioners practising in partnership in Grahamstown, claimed £61 19*s.* for professional services and attendance rendered to the defendant James Stanton, who also resides in Grahamstown; the defendant admitted the professional services and attendance, and tendered £35 14*s.* in full settlement.

From the evidence it appeared that on January 5, 1894, Mr. James Stanton was thrown from his horse in Market Square, Grahamstown, and severely fractured the elbow joint of one arm. Dr. Greathead, a leading surgeon in Grahamstown, was sent for and brought Stanton from Market Square to his (Stanton's) house and set the arm. While he was so engaged, Dr. Saunders, another Grahamstown practitioner, arrived at the house and explained that he was the regular medical attendant of the family, but that as the case was a

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serious one he would arrange for Dr. Greathead to attend it with him. In consequence, Dr. Greathead had an interview with Mrs. Stanton, the patient's wife, in which, according to his account, he said to Mrs. Stanton: "Dr. Saunders tells me that you wish him to take over the case, but that you wish him to call me in whenever necessary," and that she replied "Whatever the doctor thinks right." The other evidence as to this conversation differed slightly; Dr. Chew, who was in the room, saying that Dr. Greathead had said "and that you wish me to see the case with him;" while Mrs. Stanton and Dr. Saunders said the words were: "and that you wish me to attend the case with him." By arrangement, Drs. Greathead and Saunders saw the patient together that night, and again morning and evening on every day up to and including January 30. Each of these visits was entered by Dr. Saunders in his fee-book as a consultation; whenever Dr. Greathead arrived at the house first he always waited till Dr. Saunders arrived before visiting the patient, but their verbal consultations were generally limited to a few words exchanged either in the sick room or on the stairs. Dr. Saunders and his partner occasionally visited the patient without Dr Greathead. The arm was in a critical state for some days, a hemorrhage breaking out on the night of January 8, and "sloughing" taking place above the main artery some days later; till about January 15 there was a constant fear that mortification might set in and render amputation necessary, but the arm was ultimately saved.

The plaintiff charged these fifty visits paid from Jan. 5 to Jan. 30 as consultations, at one guinea each; the defendant contended that they were ordinary medical visits paid conjointly with Dr. Saunders, for each of which the proper charge was five shillings, but he offered to pay half-a-guinea for each, these twenty-five guineas, together with a further nine guineas admitted, making up the £35 14*s.* tendered. The evidence of several doctors was led by the plaintiffs to the effect that one guinea is the minimum fee for a consultation, though when many consultations were held a reduction might be given as a concession, on the recommendation of the regular medical practitioner; which recommendation had not been given in this case. The practice of two doctors, not partners, attending a case jointly is very

exceptional, only three instances in all were cited as having taken place in the colony, and in each case by special arrangement; none of these witnesses knew of any case in which fifty consultations had been held, but one of the defendant's witnesses said that in London or other large towns fifty consecutive consultations were not unusual. They defined a consultation as "a meeting of two medical men for the purpose of deciding on and carrying out a course of treatment likely to benefit the patient," and considered the visits in question to possess all the essentials of a consultation. Dr. Saunders, called for the defendant, said that in these visits he had looked on Dr. Greathead as a consultant, and had entered in his day book for each visit one guinea as Dr. Greathead's fee and ten shillings, a double visiting fee, as his own: these were the usual fees. He considered that all these consultations might have been necessary, although as the case progressed satisfactorily they were not actually so.

Blaine (with him *Sampson*), for plaintiffs: The only questions are (*a*) were these visits consultations; (*b*) is one guinea the proper fee for a consultation? That there were consultations was proved by overwhelming evidence, even by the defendant's witnesses; the only thing that could be alleged was that Mrs. Stanton did not know they were; but she consented to the plaintiff attending together with Dr. Saunders, and that created a legal obligation to pay the ordinary consultation fee. This fee was one guinea; such was proved to be the universal custom (*Styrap's Young Practitioner*, p. 145).

Maasdorp, S.G. (with him *Burke*) for defendant: The name by which plaintiff and Dr. Saunders called these visits does not create an obligation against defendant. Two bakers cannot palm off a penny bun as a sixpenny loaf by deciding to call it so. Before any custom of a place or class of persons becomes binding on those who do not know it, it must be shown to be reasonable, and one that prevails universally (Addison on Contracts, s. 298). The amount charged here was plainly unreasonable.

JONES, J.: This case is a simple one, and the law to be applied to it is also simple. Generally, every one who is

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employed, or who at the request of another devotes his labour to the services of that other, is entitled to a reward, and if no special stipulation is made the law implies an obligation on the employer to pay a fair amount for the work and labour done. The *Solicitor-General* has argued that you cannot import into a contract a particular trade custom unless it be a reasonable one, and one that prevails universally, but here it is not a question of importing a custom at all; you have to consider what is the usual and reasonable charge for medical services rendered as they were here, for if a particular service can only be obtained at a particular charge, the person who employs those services must be understood to agree to pay that particular charge. You have then to consider whether the plaintiff was called in as a consultant, or as an ordinary practitioner attending the case conjointly with Dr. Saunders; if he was called in as a consultant, he is entitled to the ordinary fee of a consultant physician or surgeon; if not, he can only claim by the special agreement entered into. Was there then any special agreement? On this point the *Solicitor-General* says that the plaintiffs' evidence stands alone, but consider whether there is really any practical difference between the various reports before you of the interview between him and Mrs. Stanton. The plaintiff says he said to her, "Dr. Saunders tells me you wish him to take over the case, but to call me in whenever he thinks it necessary," and that she replied, "Whatever the doctor thinks." Dr. Chew says the words were "Dr. Saunders says you wish me to see the case with him," and Dr. Saunders and Mrs. Stanton say that the arrangement was that plaintiff was "to attend the case with him." Whatever words were used, what did the parties mean by this arrangement? Was it that Dr. Saunders was to call in plaintiff as often as he considered necessary, or did she mean to make a special agreement that they were both to come as two independent medical men treating the case jointly? If you can import that into this arrangement then you can say a special agreement was entered into. Is that view consistent with the evidence and with Dr. Saunders' conduct afterwards? Dr. Saunders did not seem to understand it in that sense as he went home, and in the book produced in Court booked the fee not as an ordinary fee, but as a consultation fee. He says he thought

a consultation necessary both then and for some time later, as possible complications might have ensued. The event, he says, showed a consultation was not necessary, but the fact remains that on going home he treated it as a consultation. I will not go through the other circumstances which *Mr. Blaine* has relied on to show that these visits were really consultations. A doctor is not entitled to charge whatever he likes, but he may charge fair and reasonable fees, and it is not a simple question of buying a loaf, to which the *Solicitor-General* has compared it. If as a matter of luxury, people choose to employ two medical men, they must consider under what conditions the two would work, and whether they can employ two opposed practitioners without paying a special fee. You must then consider what is the ordinary charge for a consultation, and whether it is reasonable. The *Solicitor-General* has said the amount charged is unreasonable and absurd; so, to follow out his argument, it may seem absurd that when, for instance, you buy scrip, the broker, whose only labour may be to walk across the street and purchase it, should charge you a commission amounting perhaps to £50; still, if that be the usual charge, the person who availed himself of the broker's services cannot be heard to say that the amount he ought to pay is the expense involved in walking across the street. So in arriving at what is a just and reasonable fee, you must consider what is ordinarily charged. One of you asked to see a tariff of doctors' charges, and I may refer you to that part of Styrap's text-book which has been referred to in evidence. There the ordinary fee allowed for a consultation is stated to be one guinea, but it is added "frequency of attendance and facility of travelling may, on the recommendation of the ordinary medical attendant, be reasons for reducing the fee." If too large a number of consultations were deliberately put in with a view to increase the fees, that would be a reason for refusing to enforce the payment of the full amount; you have to consider whether too many consultations were deliberately put in. Dr. Saunders, who was called as a witness for the defendant, considers those held to have been necessary. You are to consider how much the plaintiff is entitled to as fair remuneration for his services, what is the just and reasonable amount to be charged under the present circumstances. The amount

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claimed by the plaintiff is £61 19*s.*, the defendant tenders £35 14*s.* in full settlement.

The jury found that £35 14*s.*, the amount tendered, was the fair and reasonable charge.

Judgment was accordingly entered for plaintiff for this amount, the plaintiff to pay costs subsequent to the date of tender.

VAN HEERDEN *vs.* HOLLOWAY.

Insolvency—Civil Imprisonment—Practice—Costs.

Where an imprisoned debtor who is retained under a writ of civil imprisonment surrenders his estate the detaining creditor must have notice of any application for his release, and the fact of the detaining creditor being represented at the adjudication of sequestration, does not do away with the necessity for this notice so as to entitle the debtor in its absence to an order of release, nor will the detaining creditor be forced to pay the costs of the further application to the Court for an order of release made necessary by his insisting on this notice.

1895. June 6. Van Heerden vs. Holloway.

This was an application for an order of release from civil imprisonment. The applicant was in gaol at Cradock, and since his imprisonment had surrendered his estate, which had been adjudged sequestrated by Mr. Justice Jones in chambers. At the time of his adjudication an application had been made for the release of the insolvent from civil imprisonment, but the solicitor for the detaining creditor (the present respondent) resisted on the ground that no notice had been given of this application, and that as the affidavits on which the sequestration had been granted had been filed so late that the detaining creditor could not see them, he had no authority to consent to the release; he cited *Schenk's* case, Buch. 1876, 8.

JONES, J., refused the application for release, but allowed the affidavits filed for the sequestration to be used for any further application. Notice had now been given to the detaining creditor, and applicant asked for an order of

release with costs against him. The respondent did not oppose the release, but appeared to oppose the granting of costs against him.

Sampson (for applicant): The debtor was entitled to his order of release on the previous application; the ruling in *Schenk's* case should be limited to when the detaining creditor was not represented at the granting of the sequestration; the fact of his being there does away with the necessity for notice. His opposition has caused this further application, so we are entitled to costs.

Maasdorp, S.G. (for respondent) did not oppose the release, but only the application as to costs.

BARRY, J.P.: An order for the release of the debtor will be granted. We make no order as to costs, following the decision in *Schenk's* case.

JONES, J., concurred.

LOESCHER *vs.* PELSER, KRUGER & CO., AND VAN DER HEEVER.

Insolvency—Undue preference—Common Law in Insolvency.

Where a debtor who is practically insolvent makes an alienation in favour of one creditor under circumstances which would amount to an undue preference, but the remaining liabilities of the estate are so small that sequestration cannot take place as a preliminary to setting aside the transaction under the Insolvent Ordinance, the alienation will be set aside at Common Law if there are circumstances to show that the transaction was a fraud on the other creditors.

Where a debtor had drawn up schedules for the surrender of his estate, but had not signed them, and his principal creditor knowing this induced him to withdraw the schedules and to transfer what was virtually his whole estate to him to satisfy his debt and the debts of some other creditors, this transaction was held to be a fraud on

the creditors not included in this arrangement, and was accordingly set aside under the Common Law as a fraudulent alienation.

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Loescher *vs.* Pelser, Kruger & Co., and Van der Heever.

This was an action brought by H. Loescher against the firm of Pelser, Kruger & Co., merchants, of Burghersdorp, and Van der Heever an attorney, to set aside an alienation of certain property made to them by one Louis Kluger acting on behalf of himself and his brother.

The plaintiff's declaration stated that, in November 1894, he was a creditor of Louis Kluger to the amount of £7 7*s.* 7*d.*, and of his brother Henry Kluger to the amount of £9 12*s.* 10*d.*; on the 4th November, 1894, when Henry and Louis Kluger were in insolvent circumstances, and their liabilities exceeded their assets, Louis on behalf of himself and his brother ceded to the two defendants (who were also creditors) certain cattle, namely eighteen oxen; the defendants at the time knew that the Klugers were in insolvent circumstances, and that this alienation was a fraud on the other creditors; the plaintiff had by this alienation been deprived of a settlement of his just claims, and said the alienation was in fraud of creditors, and prayed that it should be set aside.

The defendant firm pleaded that the alienation was made not to them but to Teunis Pelser, a member of the firm in his individual capacity; after hearing the evidence this plea was admitted by plaintiff to be correct.

The second defendant admitted having received the cattle, but said it was in lawful payment of a debt due to him by Louis and Henry Kluger; and denied that at the time of the alienation the Klugers were in insolvent circumstances or that he knew that they were, or that the alienation was intended to defraud creditors.

Plaintiff's declaration was amended, "eleven oxen, thirty goats, four horses, one cow and two heifers, the property of Henry Kluger, and seven oxen, one cart and harness and two horses, the property of Louis Kluger," being inserted instead of the words "eighteen oxen."

From the evidence it appeared that Henry and Louis Kluger were brothers, and lived on a farm in the Aliwal North district which they hired from one Becker. In September 1894 Henry Kluger went to reside in Bechuana-

land, leaving his stock and the management of the farm in the hands of Louis. At the end of October of that year the affairs of the brothers were in an embarrassed condition; they owed Becker £28 10*s.* for rent; £36 was due to Teunis Pelser on a promissory note, and about £40 to the firm of Pelser, Kruger & Co.; £53 was owing to the other defendant Van der Heever; £17 to the plaintiff, and £11 11*s.* to an attorney called Sweitzer, and various smaller sums which would bring the total liability up to about £190; to meet this they possessed merely the stock on the farm. Under these circumstances Louis Kluger decided to surrender their joint estate, and on Friday, November 2nd, went to Burghersdorp and instructed Mr. Attorney Scheepers to take the necessary steps. Schedules were drawn up for this purpose by Scheepers and Louis Kluger in Scheepers' office. The defendant Van der Heever saw Louis either at or in Scheepers' office on this Friday, and caused a summons for the amount due to him to be served on him there. On Sunday, November 4th, Van der Heever went out to Kluger's farm accompanied by William Pelser, managing partner of the defendant firm, who however went out only to look after the interests of his uncle Teunis Pelser to whom Kluger owed £36, and whose affairs William Pelser managed. On the farm they heard from Louis Kluger that he had drawn up the schedules to surrender his estate and, according to defendant's account of the interview, he mentioned his debts owing to Becker, Sweitzer, Pelser (*i.e.* both Teunis Pelser and the firm) and Van der Heever, adding that there were a few smaller accounts about which he had not been pressed. Van der Heever and Pelser, partly by threats of legal proceedings, partly by persuasion, induced him to withdraw the schedules and to make over all his stock to them, on condition that they would settle with the four creditors mentioned. Defendants denied that Loescher was mentioned as a creditor that day, or that they knew of the debt to him till some time afterwards. They returned to Burghersdorp that night bringing with them a letter from Louis withdrawing the schedules of surrender, and the schedules were accordingly withdrawn. Next day the stock from the farm was driven into them; this stock, as enumerated in the amended declaration, was subsequently sold for £94 10*s.*, and the proceeds divided

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amongst the four creditors. Thirty lambs, a riding horse of Henry Kluger's, the household furniture and a buck-sail were left behind in Louis Kluger's possession, with the intention, as defendant said, of settling the claims of the smaller creditors; but the buck-sail was claimed by plaintiff as his, and only given up to him on Van der Heever's writing an order "authorising" Louis to give it to him; and there was no evidence of the value of the lambs or furniture. Plaintiff, about November 10th, applied to Van der Heever for a settlement of his debt, and was offered by him 10*s.* in the pound, Van der Heever saying that if he accepted this offer he would himself take the rest of the stock on the farm. Plaintiff, however, refused this offer, and having first got judgments in the Magistrates' Court against Henry and Louis Kluger, in execution of which writs were issued and returns of *nulla bona* made, instituted the present action in order to have the alienation to Van der Heever and Kluger set aside, and the property included in it made executable in satisfaction of these judgments.

Blaine (for plaintiff): At the time of the alienation the two Klugers were hopelessly insolvent, and defendant, Van der Heever, knew this; he knew too that the schedules had been signed, and yet he took over for himself and three favoured creditors what was practically the whole estate, thereby depriving the other creditors of their *pro ratâ* share. The remedy against undue preference existed both in Roman and Roman-Dutch Common Law, and this common law has not been abolished by the ordinance. *Dig.* 50. 17. 29 and 134; 42. 8. 10; *Hunter's Roman Law*, 881; *Smith* v. *Smith*, F. 19; *Trustees of Burgher* v. *Burgher*, 1 Men. 514.

It is argued that the remedy cannot be applied here as there was no fraud on creditors, defendant being merely a vigilant creditor who secured his debt as he might do, no sequestration or *missio* in possession having taken place, But this was not the payment of a debt, it was an alienation of property; Van Leeuwen expressly limits the immunity of a vigilant creditor to cases of the payment of money. (*Cens. For.* I. 2. 12. ss. 9, 10.) Besides, all the authorities confine this immunity to cases where the creditor has acted *bonâ fide*, and knowledge of the claims of other creditors

was taken as an indication of *mala fides*. *Van Leeuw. Comment.* Vol. I. 194 (Kotzé's trans.) with Decker's note; *Voet*, 42. 8. 4.; *Burge*, Vol. III. 606; *Sande's Decis.* III. Tit. 13. 1.; *Opinions of Grotius* (De Bruyn's trans.) 465.

Sampson for defendant: Defendant had no knowledge of Loescher's claim, and left sufficient property in Kluger's possession to meet the small debts which he believed to be due. In any case he was merely a vigilant creditor and was entitled to take any steps to secure his debt before a *missio in possessionem* had taken place. If there was no *missio* or subsequent sequestration there was no remedy at common law for a so-called undue preference. *Nihil doli facit qui suum recipit.* Of course fraud would make a difference, but none of the elements of fraud as enumerated by *Voet* are present here. *Dig.* 42. 8. 6 and 17; 48. 8. 1. 2 and 3; *Voet*, 42. 8. 17 and 18.

BARRY, J.P.: In this case plaintiff claims that an alienation of the property of Henry and Louis Kluger made to the defendants should be declared null and void, and that the property in question should be made executable in a judgment obtained by the plaintiff against the said Klugers, or if the property is no longer in the defendants' possession, that the defendants should be held jointly and severally liable to the plaintiff in the amounts due to the plaintiff by Henry and Louis Kluger. The plaintiff has sued in this action Van der Heever, an attorney practising in Burghersdorp and has joined as co-defendants the firm of Pelser, Kruger & Co. It is quite clear that at the time of the alleged alienation both Louis and Henry Kluger were hopelessly insolvent, in fact the schedules had actually been drawn up for the surrender of Louis' estate, and this fact was known to Van der Heever, who is an attorney of this Court, and if any one ought to be supposed to have a knowledge of the effect of dealing with an insolvent estate, this knowledge must certainly be presumed in him. It further appears that Van der Heever was the largest creditor of the estate, and that Pelser, Kruger & Co. were also creditors.

It is quite clear that knowing these facts Van der Heever, first by threats and then by persuasion, induced Louis Kluger to part with virtually the whole of his and his

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brother's estate, and secured it for himself and some other favoured creditors. It is said that there was an arrangement that the insolvent himself was to pay the remaining creditors, and that a few lambs and also a buck-sail were left in his possession. But as to the lambs their value was trifling, and there is no evidence that they are any longer in Kluger's possession or have been applied to settle these debts, and although Van der Heever did not take possession of the buck-sail he certainly exercised a control over it. So practically we find the whole of the Klugers' estate handed over to Van der Heever for the benefit of certain creditors excluding the plaintiff. Plaintiff was a creditor of Louis Kluger to the amount of £7 7*s.* 7*d.*, and of Henry Kluger to the amount of £9 12*s.* 10*d.*; so he was really a substantial creditor, and by the action of the insolvent acting with Van der Heever has been deprived of all opportunity of sharing in the division of the assets of the estate.

Such a transaction can be called by no other name but fraud, the insolvent by the course he pursued defrauded the plaintiff of his just rights, and Van der Heever acted with him in so defrauding him. If there had been any large creditor unsatisfied, unquestionably under the ordinance this transaction would have been set aside as an undue preference; there was an undue preference and to the knowledge both of the debtor and of Van der Heever.

The defence relied on is that the insolvent law supplies no remedy as the estate was a small one, and the liabilities not great enough to admit of sequestration taking place as a preliminary to putting the insolvent law in force; and that the plaintiff cannot fall back on the common law, as it regards such a method of dealing as merely the act of a vigilant creditor. Possibly the term vigilance might be applied to a transaction of this kind, but it would be grossly misapplied; not vigilance, but fraud is the correct term, and the common law does aid against a fraudulent creditor, and so will aid the plaintiff. The defendant has virtually taken possession of the whole estate, and there is evidence that the estate would, at the time he took possession of it, have been sufficient to pay ten shillings in the £ all round. We take time as a basis for estimating the amount of loss suffered by the plaintiff and give judgment for plaintiff for £8 10*s.*, one half of the debt of £17 due to him,

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with costs as against the defendant Van der Heever; the firm of Pelser, Kruger & Co. were wrongly joined as defendants, so as against them the judgment will be absolution from the instance, the plaintiff to pay any costs which arose from their being so joined.

JONES, J., concurred.

Blaine applied for costs of obtaining judgment against Henry and Louis Kluger in the Magistrates' Court, but these were refused, the Court considering that those proceedings were not necessary as a preliminary to the present action.

ROUX AND ANOTHER *vs.* LOMBARD.

Will—Acknowledgment of Signature—Attestation.

Where a person produced a document to two others and said, "This is my will, I want you to sign it," and they then signed it, the testator folded it in such a way that although some writing was visible they could not read the contents of the document, and neither witness saw whether the testator's signature was attached to it or not. Held, *that even if it could be presumed that the signature was already attached there was not a sufficient acknowledgment of it by the testator in the presence of the attesting witnesses.*

Where a testator produces a document and says, "This is my will," this does not amount to an acknowledgment of his signature, unless the witnesses either saw or might have seen the signature to be present.

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Roux and Another *vs.* Lombard.

This was an action in which plaintiffs, John and David Roux, sought to have the separate will of their late uncle Christoffel Antony Lombard declared valid, and that they should be declared his heirs under this will and entitled to his half share of the joint estate of himself and his wife, the defendant, and that the defendant should be declared to be only a usufructuary of this half share and should be compelled to enter into proper security for its restoration. The declaration stated that the defendant is the widow of Christoffel A. Lombard, to whom she was married in community of property; that on 3rd October, 1874, he and

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she made a joint will by which the survivor was made heir of the first dying and appointed executor; that between 1882 and 1886 the said Christoffel A. Lombard duly executed a separate will, making the plaintiffs heirs of the entire joint estate of himself and his wife, leaving merely a life usufruct to his wife (the defendant); that on her husband's death in June 1890, the defendant filed with the Master this joint will and was appointed executrix testamentary of his estate, but did not file the separate will and some time in 1890 destroyed it; and that by virtue of this separate will the plaintiffs are heirs of the deceased and entitled to one half the joint estate.

The defendant in her plea denied that her late husband had duly executed a separate will, but said that he had drawn up a document which he intended should be a joint will, but which was not valid in law, inasmuch as it was not signed by the defendant, nor was the signature of her late husband to it duly witnessed by those who purported to sign it as witnesses.

From the evidence it appeared that the testator and his wife, the present defendant, lived at Riebeck, and being childless had adopted and treated as children the two plaintiffs, who are nephews of the defendant, and also two other nephews. In 1874 the testator and his wife duly executed a joint will leaving the survivor heir of the entire estate of the first dying. About 1886 testator wished to alter this arrangement and went to Mr. Theron, then a schoolmaster at Riebeck, and asked him to draw up a will for him and to keep the matter a secret from defendant. Theron drew up a will according to his instructions, purporting to deal with the entire joint estate and leaving it to the plaintiffs, whom testator appointed his heirs, leaving merely a life interest to defendant. Theron gave testator the draft will telling him to have his signature to it attested by two witnesses, and testator replied that he knew all about that. He then left Theron, taking with him the document, at this time unsigned; it was written on a half sheet of white foolscap paper, and folded up by Theron and placed in a large envelope. The testator, on apparently the same day, went to the house of Daniel van Rensburg and found there, besides Rensburg, three men, viz. J. H. Bosch, Teunis Lombard, and C. Bower; in their

presence the will was signed by Rensburg and Bosch as attesting witnesses under the circumstances stated below. Testator died in June 1890, having previously asked one Jacobus F. Lombard to look through his papers after his death. Lombard did so in the presence of defendant and one of the plaintiffs, and found in a writing desk wrapped up in one parcel two wills, viz., the joint will of 1874 and a separate will which he saw was signed by the testator and attested by Rensburg and Bosch and which he recognised to be in Theron's handwriting. Both wills were read out and all present agreed that the latter one was of no legal effect whatever, as it purported to deal with the whole estate in community and was not signed by the defendant; the two wills were left with defendant, who proved the joint will and was appointed executrix testamentary and shortly afterwards destroyed the separate will. For destroying this she was afterwards criminally indicted in the Magistrates' Court and acquitted; the two witnesses to the will gave evidence on that occasion. Subsequently the plaintiffs discovered incidentally that the separate will might be valid as regards the testator's half-share and instituted the present proceedings; the contents of the will that was destroyed were proved by Theron and J. F. Lombard.

Daniel van Rensburg stated—I remember about 1886 Christoffel Antony Lombard coming to my house; J. H. Bosch was with me and Teunis Lombard and Bower may have been present. Lombard took out of his pocket an envelope containing a half sheet of white foolscap folded up. He spread this sheet open on the table and told me I was to sign it and not to read it. I said, "How can I sign it without reading it?" He replied, "It's my will that I have made, I want you to sign it." I then signed it and so did Bosch. I saw writing on the sheet but cannot say whether testator's signature was there; he did not say, "That is my signature," nor did he sign it in my presence.

Johannes Hendrik Bosch stated—I remember in 1886 Lombard coming to Rensburg's house; he asked me and Rensburg to sign a will for him; he did not say whose will it was or that it was his; he asked us to sign without reading. He put the sheet of white paper on the table folded lengthwise; I saw writing on it but did not notice

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a signature. He said to Rensburg in jest, "You must sign it nicely." I then asked testator to sign it himself and he replied, "That does not matter," then we signed.

Teunis Lombard stated—I remember Christoffel Lombard asking the last two witnesses to sign a will. The paper was placed on the table folded crosswise; Bosch said to testator, "You sign first," and testator replied, "It doesn't matter whether I sign in your presence." Then Bosch and Rensburg signed; I saw no writing on the paper.

C. Bower also stated that the sheet was placed on the table folded crosswise, and that testator was asked by Bosch to sign first and said, "It does not matter."

Maasdorp, S.G. for plaintiffs: There is some variance in the evidence as to the facts, and it is noticeable that the story of the testator being asked to sign first is mentioned now for the first time; neither Bosch nor Bower mentioned it at the criminal trial before the magistrate, and Rensburg does not mention it. Testator knew the formalities with regard to attesting a will, and when he said, "This is my will, I wish you to sign it" it may be presumed that his signature was already attached. When witnesses cannot remember whether a signature was present or not, this fact may be judged from any incidental evidence. As to what amounts to an acknowledgment by a testator of his signature it has been held that an acknowledgment in fact, even if not expressed in words is sufficient, as where the testator produces a will with his signature visible. *Gwillem* vs. *Gwillem*, 3 Sw. & Tr. 200; *Cooper* vs. *Bockett*, 4 Moore P. C. 419; *Beckett* vs. *Howe*, L. R. 2 P. & D. 1; *Re Graniway*, 44 L. J. Prob. 6; *Inglesant* vs. *Inglesant*, 3 L. R. Prob. 172; *Re Pearn al. Purdon*, 1 Prob. Div. 70.

Sampson (with him *Hutton*) for defendant: There is no evidence that testator's signature was there when the will was witnessed, and considerable evidence that it was not. If there, some of the witnesses must have seen it; besides, when testator was asked to sign, he said, "It does not matter." Even if the signature was there, there was no proper acknowledgment. *De Bruyn* vs. *De Bruyn*, Buch. 1874, 8.

BARRY, J.P.: In this case the two plaintiffs (who are two of a number of children adopted by the defendant and her

late husband, by whom she had no children, and to whom she was married in community of property) sue the defendant in her personal capacity and as executrix in the estate of her late husband, for a declaration that they are the heirs of the husband, and as such entitled to his half share of the joint estate upon defendant's death, by virtue of a separate will alleged to have been executed by the husband about 1886, and after he had executed a mutual will with defendant, by virtue of which she, as survivor, was appointed sole heir. The plaintiffs' contention is that a separate will or codicil was drafted by the husband with the aid of Mr. Theron, a schoolmaster at Riebeck, and that this document, after being signed by the testator was acknowledged by him in the presence of two witnesses as his last will, and they were then requested by him to attest it as his will, and did so.

The evidence shows that Theron wrote out the draft of a will at the husband's suggestion; this draft was subsequently copied out by Theron on portion of one page of a sheet of white foolscap paper. This was delivered to the testator in an envelope, and was taken by him to the residence of one Rensburg, where there were a number of people collected in the house. There Rensburg and Bosch signed the document; the circumstances under which they signed the document are differently stated by Rensburg and Bosch, who were called as witnesses for the plaintiff, and also by Teunis Lombard and Bower, called by defendant. Bosch, Teunis Lombard and Bower, all agree that the paper was folded in such a way that it was impossible for the attesting witnesses to see whether the testator had already affixed his signature. Rensburg alone says that the paper containing writing was lying open on the table as he signed it as witness, but he adds that he could not say whether there was a signature on the document or not, and that he did not look for any signature, because the testator had specially requested them not to read the document.

Not until after the death of the testator was the document seen by any of the witnesses produced, and then it was found by Jacobus Lombard wrapped up with the joint will in the testator's desk. One of the plaintiffs was present at this discovery, and so was defendant, as well as

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Jacobus Lombard. Defendant expressed her surprise at the existence of such a document, and refused to recognise it as her husband's will. All present at the discovery came to the conclusion that it was invalid as a will, and Jacobus Lombard handed this document to the defendant as well as the joint will, telling her, as she says, to send the joint will to the Master, which she did, and was appointed executrix; some time afterwards the supposed informal will was by her destroyed.

Whether this will was properly executed or not must depend upon what happened at Rensburg's house. It is difficult to come to the conclusion that the document was already signed when brought there; all the witnesses called agree that the testator at no time there said in terms that he had signed the document, nor was any one asked to attest his signature. We have, moreover, the statement of Bower that before Bosch signed as a witness he asked testator to sign the document, when he replied, "It is immaterial." Teunis Lombard also heard Bosch say to testator, "You sign first," to which testator replied, "You sign; it does not matter whether I sign in your presence." Bosch himself says that he asked testator to sign it, and that he replied, "It doesn't matter (*het kom niet maar op aan*)." Even Rensburg, the other attesting witness, says, "I can't say that testator's name was on the document which I and Bosch signed; he did not say 'here is my signature, witness it.'"

Under these circumstances it is not proved to my satisfaction that the signature of deceased was on that document when he asked the witnesses to sign it. It is true that there is some evidence that he knew something about the law, but the words which the witnesses say he used go far to show that he did not apply that knowledge, if he had it, and certainly his ignorance of law was conspicuous when being married in community he tried, by a separate will, without the knowledge of his wife, to dispose of her half share of the joint estate. But even if his signature had been proved to be attached to that document before the witnesses attested, I do not think that the requirements of the law were complied with. The law requires that the testator's signature should be made or acknowledged in the presence of attesting witnesses. To ask witnesses to attest

a will does not appear to me to be equivalent to asking them to attest a signature to a will. The term "will" may be applied loosely to a document before it is signed by any one, and the term "my will" does not necessarily mean that the testator has signed it. Strictly, the term "my will" or "will" does not apply to a document which has not been completed with all the formalities required by law, and it is quite clear that when the testator is stated by Rensburg, the most favourable witness for plaintiffs, to have said, "It is my will that I have made, and I want you to sign it," it was not in law at that time the testator's will. The signature to the will was required to be attested, and not the so-called will. The signature, therefore, should have been mentioned and shown, or at least should have been shown to and seen or have been able to be seen by the attesting witnesses, and it is quite clear that, if it was there, the testator's act intentionally deprived them of seeing and thereby attesting his signature. Plaintiff's counsel has, however, relied very strongly on two cases: *Gwillem* vs. *Gwillem* (3 Sw. & Tr. 200) and *Beckett* vs. *Howe* (L. R. 2 P. & D. 1). In the first of these two cases it was supposed to have been held that if a testator produces a paper and gives the witnesses to understand that it is his will, and gets them to sign their names, that amounts to an acknowledgment of his signature, if the Court is satisfied that the signature of the testator was on the will at the time. Lord PENZANCE, taking this to be the judgment in *Gwillem's Case*, reluctantly adopted it as the law in *Beckett* vs. *Howe*. But in *Hudson* vs. *Parker* (1 Robinson, 14) Dr. LUSHINGTON held that in requiring a signature to be acknowledged the law required that the witnesses should see this signature in order to be able to depose to the fact that there was an existing signature. It would be quite sufficient to say, "this is my will," the signature being there and seen at the time; but inability to see the signature would vitiate the document as a will. Dr. LUSHINGTON'S ruling is summed up in *Jarman on Wills* (4th ed. p. 108) in the following words: "There is no sufficient acknowledgment unless witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will." In the recent case of *Blake* vs. *Blake* (7 P. D. 102) JESSEL,

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as Master of the Rolls, in following the case of *Hudson* vs. *Parker*, disapproved of the supposed law to be deduced from *Gwillen* vs. *Gwillem*, and added that in his opinion it would not be sufficient even if the testator were to say: "This is my will, the signature is inside the paper," unless the witnesses were able to see that signature. The Master of the Rolls added that Lord PENZANCE had misapprehended Sir C. CRESSWELL'S doctrine in *Gwillem's Case*, where he (the Master of the Rolls) pointed out that the signature of the testator, as printed in the report, was placed immediately above the signature of the witnesses, who, unless something was put over that signature, must have seen it if it was there, and the evidence showed that it was. BRETT, L.J., was of the same opinion, and, if *Gwillem's Case* was ever an authority for the doctrine deduced from it by Lord PENZANCE, that doctrine has been entirely overruled by the best authority in England; and inasmuch as the words of our own Ordinance are taken from the English Law, these decisions must have great weight, and indeed to my mind are conclusive on the subject. It is not surprising that until the decision in *Blake* vs. *Blake* Courts, anxious to give effect to the last wishes of testators, gave a loose interpretation to the term "acknowledgment of signature," but all their decisions are of no authority in England after the judgment in *Blake's case*. In the present case, if sympathy could by any possibility determine the law, there can be no sympathy with the testator in wishing to deprive his wife of her right to bequeath her own property, and in attempting to exclude from the enjoyment of any part of the joint estate the adopted children with the exception of plaintiffs.

We cannot declare the document destroyed to be the last will of the testator, and we accordingly give judgment for defendant. Costs will follow the result, for although she cannot be commended for destroying the paper, all the circumstances relating to attestation, and which vitiate the document as a will, are not in any way affected by that destruction, and it is, moreover, not proved that defendant acted *malâ fide* in tearing up that document after it had been regarded in the presence of plaintiff as useless.

JONES, J., concurred.

QUEEN *vs.* NWEKI.

Sale of Liquor—Evidence—Husband and Wife—Presumption of Coercion.

Where a sale of liquor was effected in a hut by a married woman in the presence of her husband, who took part in the transaction, the presumption that she acted under his coercion was held to be rebutted by the surrounding circumstances, namely, by the fact that she made several other sales about the time of the one alleged, and that when her husband wished that the price of the liquor sold should be paid to him she insisted on its being paid to her.

1895. June 12.

Queen *vs.* Nweki.

Appeal from a decision of the acting Resident Magistrate of King William's Town.

The accused Nweki, the wife of Dubulwana, was accused of contravening s. 5, Act 28 of 1883, as amended by Act 25 of 1891, in that on or about the 25th of May, 1895, at Yellowwood, she wrongfully and unlawfully sold a certain quantity of intoxicating liquor, namely, sixpennyworth of Kaffir beer to one George without a licence.

From the evidence for the Crown it appeared that on the morning of May 25, Corporals Else and Porter, of the Cape Police, marked three threepenny pieces and gave them to George and Joe, two native traps, with certain instructions. Acting on these George and Joe, accompanied by one Mngala, went to the hut of accused, and George asked for sixpennyworth of Kaffir beer, which he received from the prisoner, and paid to her two of the marked coins. Her husband Dubulwana was present, and asked that the payment should be made to him, but it was eventually made to the woman. When they entered there were other people in the hut whom they saw drinking beer and paying for it. Some beer was also given to Mngala without payment. While the traps were drinking this beer, Corporal Else entered and arrested and searched the accused, but did not find any of the marked coins in her possession, but did find three shillings about her and a threepenny piece in her mouth.

For the defence the accused, her husband and three women, relations of hers, deposed that they were in the hut

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at the time of the alleged sale; that George asked for food and they roasted some mealies for him, and that he asked for water, and there being none in the hut the accused gave him some beer, but that no money was demanded or paid for it.

The accused was found guilty, and sentenced to pay a fine of £10 or six months' imprisonment.

The grounds of appeal were (1) that there was no evidence to rebut the presumption that accused acted under the coercion of her husband. (2) That the finding was not in accordance with the evidence.

Hutton (for appellant): Where a wife commits a crime in the presence of her husband, he taking part in the transaction, there is a legal presumption that she acted under his coercion; there is no positive evidence here to rebut this. *Russell on Crimes*, 40; *Q.* vs. *Jantsze*, 7 E. D. C. 71; *Q.* vs. *Jan Makatees*, 4 H. C. 240.

Besides the evidence is in favour of its being a donation and not a sale; the marked coins were not found in the prisoner's possession.

Maasdorp (*S.-G.*), for Crown, was not called on.

BARRY, J.P.: In cases where traps are employed it is a very proper course to mark the coins entrusted to them so as to prevent a trap from using his position to the detriment of innocent persons. It does not however follow that because these marked coins were not found we are to hold the evidence of the traps untruthful. The Magistrate, who had an opportunity of observing the demeanour of the witnesses, has believed the evidence for the Crown, and no reason has been shown for holding him mistaken in so doing. The evidence of George, corroborated by the other Crown witnesses, is to the effect that he went to the hut and got beer from the accused, and that a sale was effected by her. The defence is that it was a gift, that there was no sale and that no money passed. This to some extent aids the case for the Crown, as it shows that a transaction with regard to intoxicating liquor took place, and we may believe the evidence for the defence in this respect while refusing to believe that it was a gift. The attempt to show that the alleged crime was merely the crime of the husband,

and that the wife's share in it was the result of coercion by him, fails for two reasons: Firstly, there is clear evidence that the wife took part in this sale and in the other sales, which as part of the *res gestae* may be taken as evidence to throw light on the nature of the transaction. Secondly, it is proved that the husband wished the price of the liquor sold to be paid to him, but that, in spite of his efforts to secure it, it was handed over to the accused; this is enough in my opinion to show an entire absence of coercion. I think the conviction was a proper one; in arriving at this conclusion I have been entirely guided by the evidence before us in this case, but at the same time I may say that from the many cases which come before us we do find that in cases of this sort it is often the wife and not the husband who takes the prominent part, and Magistrates sometimes err in indicting not the woman but the man, who is often found not to have been a party to the transactions which have taken place.

1895; June 12. — Queen *vs.* Nweki.

The appeal will be dismissed and the judgment and sentence confirmed.

JONES, J., concurred.

PRINCE *vs.* EAST LONDON MUNICIPALITY.

Act 20 *of* 1856, *s.* 8—*Magistrates' Court Jurisdiction—Future Rights.*

An action for wrongful impounding of plaintiff's cattle, impounded while grazing on land where plaintiff claimed he had grazing rights under the municipal regulations, is not an action whereby rights in future can be bound so as to oust a Resident Magistrate's jurisdiction under Act 20 *of* 1856.

1895. June 12. — Prince *vs.* East London Municipality.

Appeal from a decision of the Resident Magistrate of East London.

Appellant (plaintiff in Court below) sued the East London Municipality for £5 6*s.* 11*d.* damages, for that they through their agent Percy Henry Potter, commonage ranger, did wrongfully and unlawfully impound or cause to be impounded two horses, the property of the plaintiff, and kept

1885. June 12.

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the said horses for two days, and forced the plaintiff to pay the sum of 6*s.* 4*d.* before releasing them.

To this summons the defendants excepted, on the ground that it was outside the Magistrate's jurisdiction, inasmuch as it was an action which would bind future rights with regard to the use of the town commonage of East London.

From the evidence called in support of this exception it appeared that the East London Municipality had made regulations for the management of the common pasturage lands of the municipality, as they were empowered to do by the East London Municipality Act (23 of 1880, s. 38). Rule 29 provides:

"Every proprietor and occupier of a house within the limits of the municipality shall have the right to depasture on the town commonage cattle that are his own or in his *bonâ fide* service according to the following scale . . . . Every occupier of premises of the value of £100, or subject to an annual rent of £10, shall have the right to run three animals."

Rule 187:

"No inhabitant of the native location shall graze any animals without a written permission from the superintendent, and any animals so grazing may be impounded."

The alleged wrongful act consisted in impounding plaintiff's two horses while grazing on the town commonage; plaintiff was living within the municipality and owned and occupied a house of the value of over £100, but he was a native living in the location and had no written permit from the superintendent as required by Rule 187. He had had a permit in previous years, but this year, before the impounding, he had been refused one, as he had not applied in January when the superintendent issued them.

The Magistrate upheld the exception, and from this decision plaintiff now appealed.

Maasdorp, S.G. (for appellant): This is not a case of future rights being bound, as the Magistrate's decision would be no bar to another action for a trespass occurring the next day. The judgment in *Riversdale Divisional Council* vs. *Pienaar* (3 Juta, 252) shows conclusively that the Magistrate was wrong.

Sampson (for respondent): This is a wider question than

that in the case referred to; here the question is whether the council can limit a right by imposing regulations, and this affects future rights.

1895 June 12. — Prince vs. East London Municipality.

BARRY, J.P.: I do not say that this is not a case which might have been suitably tried in the higher courts, but the plaintiff is not debarred from bringing it before the Magistrate, as no future rights are bound by it; this is clearly proved by the case quoted by the *Solicitor-General*. The appeal will be allowed and the case sent back to the Magistrate to be dealt with on the merits, with costs here and of the day in the Court below.

JONES, J., concurred.

GREEN *vs.* NYATI.

Magistrates' Court—Summons—Exception.

Where plaintiff sued defendant for fees for professional attendance on defendant's son, and the defendant excepted to the summons on the ground that it did not set forth that the service was rendered at his instance or request or that the son was a minor. Held, *that these omissions did not invalidate the summons.*

1895. June 12. — Green vs. Nyati.

Appeal from a decision of the Resident Magistrate of Peddie.

Nyati (the respondent) had been summoned at the Resident Magistrates' Court at Peddie to show why he had not paid to Percy A. Green, medical practitioner, the sum of three guineas which plaintiff says he owes for professional services and attendance on his son in October, 1894, as the account annexed to the summons would more fully show.

The account annexed was: "Nyati, Dr. to Dr. Green, for attendance and operation on his son in October, 1894, three guineas."

To this summons the defendant excepted on the ground that it disclosed no cause of action, as it did not set forth that the attendance was rendered at the defendant's instance and request, or that the son was a minor.

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The Magistrate upheld the exception, and, no application being made by the plaintiff to amend, dismissed the summons.

From this decision the plaintiff now appealed.

Maasdorp, S.G. (for appellant): The words omitted are not necessary for the validity of a summons; they do not occur in all instances in the forms in the Schedule of Act 20 of 1856, for example in the claims for wages and agistment. The cause of action was in this case quite clear.

There was no appearance for respondent.

BARRY, J.P.: The Magistrate was wrong in allowing this exception; the appeal will be allowed and the case sent back to him for determination on the merits; the respondent to pay costs of the appeal and costs of the day in the Court below.

JONES, J.: I concur in thinking this exception ought to have been disallowed. It has frequently been pointed out that when it is perfectly clear what a defendant is being sued for, and when there is no prospect of his being prejudiced, a merely technical exception ought not to be allowed.

BAKER *vs.* HAWKINS.

Contract of Sale—Interest.

Where property is sold for a certain price payable in monthly instalments and no stipulation is made providing for the payment of interest on the purchase money, interest can only be claimed by the vendor on each instalment from the date it falls due till its payment.

1895. June 15. — Baker *vs.* Hawkins.

This was an action to enforce a contract of sale and for damages for delay in carrying it out.

In October 1894 plaintiff, who resided at Humansdorp, entered into a contract with defendant, then residing in the South African Republic, for the purchase of a house and erf at Humansdorp belonging to defendant. It was agreed that the price was to be £350, payable in monthly instalments of £5 each and that purchaser should defray costs

of transfer and take possession after the signing of a deed to be drawn up, and payment of the first instalment. After the contract was completed, defendant appeared anxious to withdraw from it, and in the agreement of sale which he sent to plaintiff to be signed, he inserted various new conditions, viz. that the purchaser was to pay 6 per cent. interest on the purchase money till it was all paid up; that he should undertake to insure the building for £350 and pay the premiums, and that if he failed to pay any instalment at the due date the vendor should have the right to resume possession of the property and the purchaser should forfeit all the instalments previously paid. Plaintiff refused to sign this agreement, and submitted one to defendant omitting these new conditions; and on defendant refusing to sign this or to give him possession of the property he instituted the present action. Defendant pleaded that he had tendered for signature an agreement in accordance with the contract, which plaintiff had refused to sign. The Court held that the conditions about insurance and the power given to vendor to resume possession on purchaser's failure to pay any instalment were conditions not contained in the original contract and were wrongly imported into the agreement by defendant, but wished the question argued, whether defendant had not a right to have a clause inserted providing for the payment of interest on the purchase money, although there was no express stipulation to that effect.

Maasdorp, S.G., for plaintiff: Interest can only be claimed if there is an agreement to that effect or if there is *mora*. Here there can be no *mora* till the date of payment of each instalment, and there is admitted to be no express agreement. An agreement to pay interest cannot be implied in an ordinary contract like this. *Chitty on Contracts*, 595 *and* 559; *Foster* vs. *Weston*, 6 Bing. 709; *Higgins* vs. *Sargent*, 2 B. & C. 348.

Blaine (for defendant): There is evidence that it is the almost universal usage in contracts for sale to charge interest; hence it might be held that this condition was implied here, but in *Zeederberg's Trust* vs. *Zeederberg*, 4 Juta 353, it was held otherwise, and that case seems decisive against me.

1895. June 15. — Baker *vs.* Hawkins.

The defendant was accordingly ordered to give up possession of the property to plaintiff on plaintiff paying the instalments of the purchase money due on 1st July prox.: and to sign an agreement omitting the three conditions imported by defendant into the draft agreement; also to pay £8 damages caused by his delay in giving possession and the costs of the suit.

SUPRA *vs.* SCHLODDER AND SCHLODDER.

Summons—Exception—Magistrates' Court.

Where a summons in the Magistrates' Court claimed a certain sum due to plaintiff in respect of the occupation by defendant for a certain time of premises which were fully described, but did not set forth any contract of lease or state that the premises were the property of the plaintiff, the summons was held to set forth sufficiently the nature of the claim.

1895. July 12. — Supra *vs.* Schlodder and Schlodder.

This was an appeal from a decision of the acting Resident Magistrate of Stutterheim.

The appellant (plaintiff in Court below) had sued the respondents for £14 due for rent. The summons called on the defendants to show cause why they had not paid to the plaintiff the sum of £14, being for two years' rent due and payable by the said defendants to the said plaintiff for and in respect of the occupation by them the said defendants during the period aforesaid, calculated from the 1st day of April, 1893, to the 31st day of March, 1895, at the rate of £7 per annum, of a certain piece of land known as Lot No. 8, Block 0, situate in the Upper Kabousie in the division of Stutterheim, which said sum the defendants neglect or refuse to pay.

The defendants excepted to the summons on the ground that it assigned no cause of action, there being no allegation of a lease between plaintiff and defendants.

The exception was upheld, and from this decision the plaintiff now appealed.

King (for appellant): The claim for occupation is quite

sufficient without any allegation of a lease; in fact it is according to the form in the Schedule to the Magistrate's Court Act. The summons would be quite regular only for the omission of the words "the property of the plaintiff" after the description of the land; but this cannot have caused any real doubt as to what the cause of action was, nor is its addition in all cases necessary, even according to the forms. Besides, this was not the exception taken. *Ackerman* vs. *Adams*, 1 Juta, 177.

There was no appearance for respondents.

JONES, J.: This Court and the Supreme Court have indicated very clearly that exceptions of a purely technical nature should not be allowed where no prejudice thereby is occasioned to the other party. Here it is quite clear that no prejudice could have been caused to the defendant by the omission of any allegation with regard to a lease; no such allegation is required by the forms in the schedule of the Act, nor is it necessary. The summons ought as a rule to state to whom the premises in respect of which the action is brought belong, but here the claim is clearly for rent, the premises are accurately described, and the rent, if due to the plaintiff, must be due to him as owner, or as representing the owner; at all events, there can be no doubt whatever as to the exact nature of the claim. The appeal will be allowed and the case sent back to the Magistrate to be decided on the merits, the respondent to pay costs here and of the day in the Court below.

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HUSBAND AND WIFE.—*Coercion.*—Where a sale of liquor was effected in her hut by a woman in the presence of her husband who took part in the transaction, the presumption that she acted under his coercion was held to be rebutted by the surrounding circumstances, viz., by the fact that she made several other sales about the same time, and that when her husband wished that the price of the liquor sold should be paid to him she insisted on its being paid to her.—*Q.* vs. *Nweki* 209

2. —— Where a wife married in community purchases on credit clothing and other necessaries for herself and her children and subsequently is divorced from her husband, she is liable for one half of the sum owing for necessaries at the date of the divorce. —*Copeland and Creed* vs. *Ditton* 123

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3. —— Where a debtor in prison under a writ of civil imprisonment surrenders his estate, the detaining creditor must have notice of any application for his release, and the fact of his being represented at the adjudication of sequestration does not do away with the necessity for this notice.—*Van Heerden* vs. *Holloway* 194

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LIBEL.—Where a medical man allows a paragraph to appear uncontradicted in a newspaper, attributing to him higher qualifications than he possesses, this justifies a writer to a newspaper in accusing him of falsely giving himself forth as possessing these qualifications.—*Saunders* vs. *Mackay* 20

2. —— Where a medical man by mistake sends in a bill to a patient twice as large as it ought to be, and the mistake when pointed out is at once rectified, this mistake does not justify a person, writing after the mistake is corrected, in accusing the medical man of sending out a bill to a patient, "when he knows he could not recover the amount or half the amount in a Court of law."—*Saunders* vs. *Mackay* 20

3. —— It is not libellous to say of a newspaper that it consists mainly of cuttings from other papers, or to suggest that it is run on petty and personal lines.—*Hay* vs. *Roberston* 170

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2. —— *Act* 28 *of* 1883, *s.* 75.—In a charge of selling, dealing in, or disposing of liquor without a licence, it is necessary to set forth the name of the person or persons to whom it is alleged the liquor has been sold.—*Queen* vs. *M'Glashun* 9

3. —— *Act* 28 *of* 1883, *s.* 75.—Where a contractor opened a store at his works, where he did not himself reside, and placed a shopman in charge of it, and the manager of the works was left temporarily in charge of the store by the shopman, and in his absence sold intoxicating liquors in the store, which was unlicensed, it was held that these facts did not make him an agent of the contractor, so as to make the contractor liable for a breach of the Licensing Act.—*Queen* vs. *Maybe and Hine* .. 186

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